

Bequeathed to
The Library
of the
University of Toronto
by
the late
Hon. Mr. Justice Armour
for many years
a Member of the Board of
Governors of the University

ENCYCLOPÆDIA
OF THE
LAWS OF ENGLAND

VOLUME XI

EDITORS

A. WOOD RENTON, Esq., PUISNE JUSTICE OF THE SUPREME COURT
OF CEYLON

MAX. A. ROBERTSON, Esq., OF THE INNER TEMPLE AND THE
MIDLAND CIRCUIT, BARRISTER-AT-LAW

Law. II
F565.2

ENCYCLOPÆDIA
OF THE
LAWS OF ENGLAND

WITH FORMS AND PRECEDENTS

BY THE

MOST EMINENT LEGAL AUTHORITIES

SECOND EDITION

REVISED AND ENLARGED

VOLUME XI

PEACE, BILL OF, TO PROCLAMATION

311126
—
7. 2. 35

LONDON AND EDINBURGH
SWEET & MAXWELL, LTD., AND WM. GREEN & SONS
TORONTO
THE CANADA LAW BOOK COMPANY



Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

THE AUTHORS OF THE PRINCIPAL ARTICLES IN THIS
VOLUME ARE AS FOLLOWS:—

[Square brackets indicate that the article has not been revised by the original author.

In these articles square brackets throughout the text indicate new matter added to the original article.]

An asterisk (*) indicates that Forms or Precedents are appended to the article.

Peace, Clerk of.—W. F. Craies.

Pedigree, Proof of.—J. G. Pease.

Peerage.—Geoffrey Ellis.

Penal Action.—W. F. Craies.

Penal Servitude.—W. F. Craies.

Performance.—J. D. Israel. [C. Johnston Edwards.]

Perils of the Sea.—G. G. Phillimore.

Perjury.—W. F. Craies.

Perpetuating (Perpetuation of) Testimony.—C. Burney, one of the Masters of the Supreme Court of Judicature.

Perpetuity; Perpetuities, Rule against.—T. Cyprian Williams.

Persia.—Alexander Pulling.

Personal Property.—J. D. Israel. [C. Johnston Edwards.]

Peru.—Alexander Pulling.

Petition.—C. Burney, one of the Masters of the Supreme Court of Judicature.

Petition of Right.—H. A. de Colyar, K.C.

Petitions, Parliamentary.—E. A. Owen. [A. Wood Renton, Puisne Justice of the Supreme Court of Ceylon, and J. S. Henderson.]

Pews.—J. A. Price.

Pilots; Pilotage.—G. G. Phillimore.

Piracy; Pirate.—G. H. B. Kenrick.

- Pleading; Pleadings*.—W. Blake Odgers, K.C.
- Police, Borough*.—W. F. Craies.
- Police, County*.—W. F. Craies.
- Police Courts*.—John Rose, Metropolitan Police Magistrate.
- **Poor; Poor Law*.—W. W. Mackenzie. [Geoffrey Ellis.]
- Pope*.—Sir Thomas Barclay, Knt. [The late R. M. Johns.]
- Port*.—G. G. Phillimore.
- Portions*.—J. D. Israel. [C. Johnston Edwards.]
- Portugal*.—Alexander Pulling.
- Possession*.—John M. Lightwood. [C. Johnston Edwards.]
- Possessory Lien*.—W. Bowstead. [A. Wood Renton, Puisne Justice of the Supreme Court of Ceylon, and J. S. Henderson.]
- Posthumous Child*.—F. W. Sherwood.
- Post Office (The)*.—S. W. Casserly.
- Poundage*.—J. R. M'Ilraith. [Geoffrey Ellis.]
- **Power of Attorney*.—W. Bowstead.
- **Powers*.—J. S. Vaizey.
- Powers in Settlements of Personalty*.—M. G. Davidson. [C. Johnston Edwards.]
- Prayer-Book; Book of Common Prayer*.—J. A. Price.
- Precatory Trusts*.—H. A. de Colyar, K.C. [C. Johnston Edwards.]
- Precedence; Precedency*.—G. H. Knott. [Geoffrey Ellis.]
- Precedents*.—D. M. Kerly. [N. G. L. Child.]
- **Preliminary Act* (excluding Forms).—F. A. Stringer, of the Central Office.
- Prerogative Legislation*.—Alexander Pulling.
- Prerogative Writs*.—G. H. B. Kenrick.
- Prescription*.—J. R. V. Marchant. [N. G. L. Child.]
- Presumptions*.—J. G. Pease.
- **Principal and Agent*.—W. Bowstead.
- Principal and Surety*.—J. D. Israel. [C. Johnston Edwards.]
- Priorities*.—J. D. Israel. [C. Johnston Edwards.]
- Prison*.—W. F. Craies.
- **Private Bill Legislation*.—W. Bowstead.
- Private International Law*.—Sir Thomas Barclay, Knt. [G. H. B. Kenrick.]
- Privilege; Privileged Communications*.—W. Blake Odgers, K.C.

LIST OF AUTHORS

vii

Privileges, Committee for.—Geoffrey Ellis.

Privy Council.—Sir Thomas Raleigh, K.C.S.I., K.C.

Prize (or Prize of War).—Sir Thomas Barclay, Knt. [G. H. B. Kenrick.]

Probate.—C. A. Montague Barlow.

Probation of Offenders.—W. F. Craies.

ERRATUM.

Vol. IV. p. 355, l. 22, *for* the sentence beginning "It is immaterial," and the next sentence, *read* "Estate duty is payable on the personalty situate in England of a person who died not domiciled in England, but is not payable on the assets abroad of such a person even if he died in England" (*Winans v. R.*, [1908] 1 K. B. 1022).

ENCYCLOPÆDIA

OF

THE LAWS OF ENGLAND

Peace, Bill of.—The bill of peace was the mode of seeking equitable relief when it was desired to definitely establish rights against numerous persons and avoid future controversy. It was similar to but not identical with a bill *quia timet*. “By a bill of peace we are to understand a bill brought by a person to establish and perpetuate a right which he claims, and which from its nature may be controverted by different persons at different times and by different actions; or where several attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in the right if it is already sufficiently established” (Story, *Eq. Jurisprudence*, 11th ed., s. 853). Its name, “bill of peace,” sufficiently indicates its obvious purpose—the securing for the person who brings the bill repose from continual litigation; and relief was granted on the well-settled principle of the Courts that multiplicity of suits was against public interest, and must be checked.

Accordingly, where a man set up a general exclusive right, and the persons who controverted it were very numerous, and he could not by one or two actions at law “quiet” that right, if he went to a Court of Equity the Court would direct an issue to determine the right, as in disputes between lords of manors and their tenants, or tenants of one manor and another; for in all these cases there would be no end of bringing actions for trespass, each action determining only the particular right in question between the plaintiff and defendant (*Lord Tenham v. Herbert*, 1742, 2 Atk. 483; 26 E. R. 692). The Court would in such cases grant a perpetual injunction.

Instances of cases, besides those above noticed, to which a bill of peace was held applicable, are rights of common, rights of fishery, and claims for tolls or profits of a fair. See, for illustrative cases, *Mayor of York v. Polkington*, 1 Atk. (where rights of fishery enjoyed by Corporation of York and constantly exercised by them had been from time to time opposed by different lords of manors); *Merritt v. Eastwicke*, 1684, 1 Vern. 264; 23 E. R. 459; 1 Abr. Ca. Eq. 79 (claim by several tenants to profits of a fair); *New River Co. v. Graves*, 1701, 2 Vern. 431; 23 E. R. 877 (bill to quiet the company in possession of pipes laid through the defendant's grounds).

Another class of cases where the Courts of Equity granted relief was where the plaintiff has repeatedly established his right at law against various parties; the jurisdiction of equity in this respect was at first subject to some doubt, but was clearly enunciated by the House of Lords in the case of *Lord Bath v. Sherwin*, 1706, Prec. Ch. 261; 24 E. R. 126, this being a case where the plaintiff had previously won five

separate actions for ejectment. The fusion of law and equity and the creation of the High Court have made it possible to grant all appropriate remedies in a single proceeding.

On the other hand, the Courts refused to entertain bills of peace for the purpose of settling boundaries (*e.g.* of two manors or two parishes); or again where the right was in dispute between two persons only (*e.g.* bill by one tenant of a manor claiming a right by custom on behalf of tenants of his manor against those of another manor). And in no case would the Court decree a perpetual injunction to protect a party against a public right (*e.g.* where a party claimed an exclusive right to a highway). But a bill would lie by plaintiff to be quieted in possession of a common.

The bill usually prayed not only for special relief, viz., that the plaintiff be quieted in his possession of the premises, etc., but also for general relief in the premises, and for a perpetual injunction.

Under the Judicature Acts bills of peace have been superseded by actions to declare rights, and by the procedure for dealing with representative actions. The modern statement of claim takes the place of the old bill of peace, and the same relief may be asked for.

A precedent of judgment establishing the right to an oyster fishery, and "quieting" the plaintiff in possession, will be found in Seton on *Decrees*, 6th ed., 740; also a claim for declaration and perpetual injunction. And for a more modern case on the subject, see *Sheffield Waterworks Co. v. Ycomans*, 1866, L. R. 9 Ch. 8, where it was held that where a large number of persons have similar (though not identical) claims against a party he could, by a bill filed against some of them, restrain the proceedings of all until the question as to the validity of the claims had been decided; for, the rights of the numerous claimants all depending upon the same question, such an action, even if not, strictly speaking, a bill of peace, was clearly within the principle of such bills. And such a case was a fit one for a Court of Equity to interpose (by analogy at least to bills of peace) and prevent the unnecessary expense and litigation which would be occasioned by not deciding once for all the question upon which the validity or invalidity of all the claims depended (see Story's *Eq. Jurisprudence*, *loc. cit.*; Seton on *Decrees*, 6th ed., 740-743; Maddock's *Practice of Chancery*, vol. i. p. 166, "Bills of Peace," where the old cases are collected).

Peace, Breach of.—1. Under the Saxons and Danes there was established in England a kind of mutual insurance system, known as "frith borgh," or "peace pledge," whereby feuds or quarrels arising out of manslaughter or other wrongs were settled or compounded by the friends of the offender, *i.e.* social or communal responsibility was recognised in place of that of the individual (1 Pike, *Hist. Crim.* 57, 438). After the Conquest, as a means of strengthening this system with a view to obtaining better security for peace, every freeman was required to be in a tithing (*in decennā*) which was responsible for his good behaviour, and an oath of FRANKPLEDGE was taken twice a year to see that the law was complied with. The system was not effective, and in the reign of Henry III. and Edward I. was supplemented by provisions establishing constables, and setting up watch and ward for highways and towns; a system which, with most of its defects, continued into the nineteenth century, till the establishment of the present police force (see CONSTABLE; HEAD BOROUGH; POLICE).

From the Conquest there was also gradually developed, with the improvement in the administration of the law, a conception of "the peace," as representing the state of law and order required by the superior of the realm, or the county, or the manor; and breaches of the law or custom of such areas came to be described as "breaches of" (or as "against the peace of") the King, the sheriff (1 Seld. Soc. Pub. 21), or the lord of the manor (1 Seld. Soc. Pub. 192). That the peace of the King means his law and sovereignty is clear from an entry of 1201 (1 Seld. Soc. Pub. 84), which speaks of an event "after the peace of our Lord the King, then Duke of Normandy and Lord of England, was sworn," referring to the end of the interregnum between the death of Richard I. and accession of John. The Crown or central executive, gradually gaining strength, drew to itself, or treated as offences *contra pacem regis*, all wrongful acts of public concern; and by the system of circuits and presentments, coupled with amercements for not presenting, acquired for its justices in eyre cognisance of all those matters which may be summarised as pleas of the Crown. With the abolition of the right of the sheriff to hold pleas of the Crown, this process became complete, and the scope of the commissions of the justices in eyre was widened accordingly (1 Seld. Soc. Pub. 20). Besides the itinerant officers of the Crown, there were established resident officers—first by writ, described as conservators of the peace, and subsequently under statute and commission—as justices of the peace (see JUSTICE OF THE PEACE; COMMISSION OF THE PEACE).

All persons, whether subjects or aliens, who are within the King's peace were and are entitled to the protection of his laws and officers, and correlatively are bound to respect them. In this wide sense every breach of the public law of the land is a breach of the peace, and is so described in an indictment.

2. In the narrower sense, breach of the peace is often used to denote some violent or disorderly act causing public alarm or disturbance, and not a mere technical breach of the peace (1 Russ. Cr., 6th ed., 194). In this sense it is not a distinct offence, but a mode of describing certain classes of offences with reference to the power of ARREST, and swearing the peace or binding over to good behaviour. See ARREST; ARTICLES OF THE PEACE.

Peace, Clerk of.—*Appointment.*—The office of clerk of the peace has existed as long as the commission of the peace, and till 1545 the appointment was made by the *custos rotulorum*, as responsible for the records of sessions, and the clerk was his deputy. Abuses seem to have arisen by obtaining grants for life to incompetent persons; and the mode of appointing the *custos rotulorum* was then altered (37 Hen. VIII. c. 1), except in certain liberties and franchises (s. 4). It was made during pleasure; and the clerk was required to discharge his duties personally, or by his sufficient deputy learned in the laws of the realm and able to supply the said office (s. 1). Abuses seem again to have crept in; and in 1688 (1 Will. & Mary, c. 21) the *custos rotulorum* was required to nominate and appoint an able and sufficient person resident in the county, to hold office and act by himself, or sufficient deputies, during good behaviour (s. 4). The appointment was a freehold for life on condition of good behaviour, and could not be made at pleasure (*R. v. Owen*, 1694, 4 Mod. 293; *Harcourt v. Fox*, 1693, 1 Show. 530). The justices of the peace were empowered to discharge the clerk for

misconduct, after inquiry at Quarter Sessions (*R. v. Lloyd*, 1734, 2 Str. 996); and in such a case a new clerk was appointed by the *custos rotulorum*, or, in his default, by the justices (ss. 5, 6). Buying or selling the office, or taking a fee on appointment, is forbidden (s. 7); and the clerk, on appointment, has to make a declaration on the subject (s. 8; 31 & 32 Vict. c. 72).

The mode of appointment and removal in counties was altered in 1888 (51 & 52 Vict. c. 41), and the appointment is now made, not by the *custos rotulorum*, but by the standing joint committee of the county justices and the county council (s. 83). From 1864 till 1888 there existed, besides the power of 1688, a power to remove a clerk of the peace for unofficial misconduct, subject to appeal to the Lord Chancellor (27 & 28 Vict. c. 65). But it was superseded (as to all clerks appointed since August 13, 1888) by the power of removal given to the county joint committee by sec. 83 of the Act of 1888, and was repealed in 1893 (56 & 57 Vict. c. 54).

In Quarter Sessions boroughs (see 51 & 52 Vict. c. 41, s. 119), whether county boroughs or not, the clerk of the peace is appointed during good behaviour by the town council (45 & 46 Vict. c. 50, s. 164 (1), (2)), and is removable by the recorder (s. 164 (3), (4)).

In boroughs the clerk of the peace can appoint a deputy in case of his illness, incapacity, or absence (45 & 46 Vict. c. 50, s. 164 (3)). Where it appears to the appointing authority that from illness, absence, or any other cause, the clerk of the peace for a county or borough is unable to make, appoint, or remove a deputy, that authority may make, appoint, or remove the deputy, and on making an appointment may assign to the deputy a suitable salary out of the clerk's salary or stipend (6 Edw. VII. c. 46, s. 1).

In counties the deputy may be appointed by the standing joint committee under 51 & 52 Vict. c. 41, s. 83 (4), or appointed or removed by them under 6 Edw. VII. c. 46, s. 1.

There is also power temporarily to fill a vacancy in the office of clerk of the peace (6 Edw. VII. c. 46, s. 1 (2)).

A county clerk of the peace may not sit in Parliament if required to give his whole time to his employment (51 & 52 Vict. c. 41, s. 83 (13)).

The clerk of the peace of a county or borough cannot be clerk to justices either of the county or any borough situate in it (40 & 41 Vict. c. 43, s. 7; 45 & 46 Vict. c. 50, s. 159). Under 22 Geo. II. c. 46, s. 14, he was forbidden to act as a solicitor before his Court. The Act is repealed (6 & 7 Vict. c. 43), but breach of so obvious a rule of conduct would be ground for removal.

Clerks of the peace and their deputies are exempt from service on juries.

Duties.—The duties of the clerk of the peace fall under three heads.

1. As representative of the *custos rotulorum*, he has charge of the county records, including those of the general or Quarter Sessions. Under the Local Government Act, 1888, he has charge of, and is responsible for, the administrative and judicial records of the county, subject to the directions of the *custos rotulorum*, or the Quarter Sessions, or the County Council, according to the nature of the documents (s. 83 (3)). See *Duke of Bedford v. Duke of Westminster*, 1899, 16 T. L. R. 114. In boroughs the custody of many such documents is in the town clerk.

2. So long as justices or Quarter Sessions had the administration of their counties, the clerk of the peace was their chief officer. On the

transfer of these functions to County Councils, the clerk of the peace became clerk to the County Council, except in the county of London. In those counties which have been formed into two or more administrative counties, *i.e.* Lincoln, Northampton, and Yorkshire, there is a clerk of the peace (who is also county clerk) for each division. Suffolk and Sussex have each only one commission of the peace, but the clerkship of the peace, while a separate office for each administrative county, may be held for both divisions by the same man (51 & 52 Vict. c. 41, s. 83). On the creation of County Councils, contracts entered into with the clerk of the peace, and property vested in him on behalf of the county, passed over to the Council (51 & 52 Vict. c. 41, ss. 64, 79 (3)). The clerk of the peace has the duty of sending to the Secretary of State or Local Government Board any accounts or returns required by either House of Parliament (51 & 52 Vict. c. 41, s. 83 (13)). The clerk of the peace has to receive inclosure awards (see 41 Geo. III. c. 109, s. 35; 3 & 4 Will. IV. c. 87), and plans deposited by promoters under special Acts authorising the taking of land compulsorily for the purposes of national defence, or municipal or industrial undertakings (7 Will. IV. c. 83; 8 & 9 Vict. c. 16, s. 161; c. 20, s. 9). He has also to receive the jury lists under the Juries Acts of 1825 (6 Geo. IV. c. 50, s. 12), 1862 (25 & 26 Vict. c. 107, ss. 9, 10), and 1870 (33 & 34 Vict. c. 77, s. 25). He has also to receive the corrected lists of parliamentary and local government electors prepared at the annual Revision Court, and to print and distribute them. The property, trustees, and objects of charities must be registered with the clerk of the peace (under 52 Geo. III. c. 102; 51 & 52 Vict. c. 41, s. 3). In the exercise of his duties with respect to these matters, the clerk is now under the control of the County Council, and not of Quarter Sessions (51 & 52 Vict. c. 41, s. 83 (6)).

Duplicates of the warrants of the appointment and declaration of office of sheriffs and ex-sheriffs and coroners are filed with him.

3. The clerk of the peace has the same position in the judicial business of a Court of Quarter Sessions that the clerk of the Crown or of assize has in a Court of Assize. He prepares the indictments (see 10 Will. III. c. 12, ss. 7, 8), so far as that is not undertaken by private enterprise, calls over the panel of grand and petty jurors, swears the juries, receives the bills when found, arraigns the accused, charges the jury with them, and receives the verdict (Archb., *Quarter Sessions*, 5th ed., 82; Pritchard, *Quarter Sessions*, 2nd ed., 56).

Where a second Court is formed, the clerk appoints a deputy to act for him in it (21 & 22 Vict. c. 73, s. 9; 45 & 46 Vict. c. 50, s. 168).

He is the proper officer to receive fines imposed, and to make up the rolls of estreats (see ESTREATS; FINE; as to Quarter Sessions boroughs, see 20 & 21 Vict. c. 50, s. 5). His duties extend to fines imposed by coroners (50 & 51 Vict. c. 71, s. 19); and he is entitled to have monthly returns sent to him of penalties imposed and paid in petty sessional divisions of his county or borough (11 & 12 Vict. c. 43, s. 31).

He is also the taxing officer of the Court with respect to the taxing of costs payable out of the county or borough rate; and may also be required to tax solicitors' bills relating to the business of parish and district councils and guardians of unions (7 & 8 Vict. c. 101, s. 39; 38 & 39 Vict. c. 55, s. 249).

His duties also extend to attendance on the Court on the hearing of appeals; in which any costs ordered to be paid are paid to him (11 & 12

Vict. c. 43, s. 27). Costs on appeals must be taxed during sessions unless the parties by written minute otherwise agree (*Midland Rly. v. Edmonton Guardians*, [1895] 1 Q. B. 357; A. C. 485), or in cases within sec. 20 of the Licensing Act, 1902, 2 Edw. VII. c. 28.

The clerk of the peace of a county is also *ex officio* clerk to the confirmation committee of the Quarter Sessions for licensing business (4 Edw. VII. c. 23, s. 6; Licensing Rules, 1904, r. 48).

Salary and Fees.—Tables of fees to be taken by clerks of the peace in county or borough Quarter Sessions are fixed by the justices and certified by a Secretary of State, and published by being affixed in the Court. It is illegal to receive any other or higher fees (57 Geo. III. c. 91, ss. 2, 3, 4; 11 & 12 Vict. c. 43, s. 30; 45 & 46 Vict. c. 50, s. 164). See Pritchard, *Quarter Sessions*, 2nd ed., 61.

To these tables must be added the special fees imposed by 30 & 31 Vict. c. 35, s. 5, and 32 & 33 Vict. c. 89, s. 10; and under sec. 28 of the S. J. Act, 1879.

Clerks appointed since 1851 are as a general rule paid by salary instead of fees, subject to power in the justices to except certain fees in computing the salary (14 & 15 Vict. c. 55). Since 1888 the standing joint committee in counties settles the amount of salary, and the fees, if any, to be excluded (51 & 52 Vict. c. 41, s. 83 (5)). Where the clerk is paid by salary, the fees must be accounted for, and a return made to the county treasurer (14 & 15 Vict. c. 55, s. 11). The provisions for compensating for loss of fees consequent on this change (18 & 19 Vict. c. 126, s. 18; 32 & 33 Vict. c. 89, s. 11) seem to be spent.

[*Authorities.*—Archb., *Quarter Sessions*, 6th ed., by Radcliffe, 1907; Pritchard, *Quarter Sessions*, 2nd ed., by Matthews and Millward, 1904.]

Peace, Commission of the.—See COMMISSION OF THE PEACE.

Peace Conference.—See HAGUE CONFERENCE; INTERNATIONAL LAW.

Peace, Justice of the.—See JUSTICE OF THE PEACE.

Peace, The.—It is difficult to say whether the use of this term in English law is to be traced to an Anglo-Saxon, or a Roman, or a combined origin. The great conceptions of the Pax Romana, followed by that of the Pax Dei or Pax Ecclesiæ, may have contributed in the hands of clerics to give a continental form to the expression in English law; but it is clear that before the Conquest there had been developed a conception of the peace of the King, sheriff, lord, even householder, and of each minister, or parish church (Pollock and Maitland, 2 *Hist. Eng. Law*, 452). After the Conquest the notion developed with the growth of royal supremacy, till the peace of the King became the one peace to be kept, and those of the Church and the sheriff and minor lordships waned, and with the reign of Henry VIII. may be said to have been relegated to history. So far as England is concerned, the term peace meant the right of the person whose peace it was spoken of to have persons under his privilege or protection, respected and not interfered with in liberty or property. It has now grown almost to mean the supremacy of the Crown as protector of public order and individual

liberty, *i.e.* the privilege and protection are now those of all persons not alien enemies who are within the realm.

[*Authorities.*—See Pollock (“The King’s Peace”), *Oxford Lectures*; 2 Pollock and Maitland, *Hist. Eng. Law*, 452, 461.]

Peculiar.—This term was formerly of widely-extended application in relation to ecclesiastical jurisdictions, a “peculiar” being a district which is exempt from the jurisdiction of the ordinary of the diocese” (Dr. Phillimore, note to *Aughtie v. Aughtie*, 1810, 1 Phillim. 201); but peculiars have now been practically abolished by legislative enactments. “There were, as appears from the Report of the Ecclesiastical Commissioners of February 15, 1832, p. 21, upwards of three hundred of such special ecclesiastical jurisdictions in England, including royal peculiars, of which there were eleven. The Commissioners recommended the abolition of all peculiars” (Chitty, J., *Combe v. De La Bere*, 1882, 22 Ch. D. 316, 328). In accordance with this recommendation, the Commissioners were given statutory powers to prepare schemes for transferring peculiars to the jurisdiction of the bishop of the diocese within which they were situated, such schemes to be confirmed by Order in Council (1836, 6 & 7 Will. IV. c. 77, s. 10; 1850, 13 & 14 Vict. c. 94, s. 24). This was done with all parishes and places locally situated in the dioceses (*inter alia*) of Canterbury and London by Order in Council of August 8, 1845, excepting the cathedral churches, royal residences, and churches or chapels founded therein or annexed thereto, including the Collegiate Church of St Peter, Westminster (Westminster Abbey). Certain peculiars have been abolished by statute, *e.g.* St Margaret’s and St John’s, Westminster (1840, 3 & 4 Vict. c. 113, s. 29; *Combe v. De La Bere*, above), and the deanery of St. Burian in Cornwall (1850, 13 & 14 Vict. c. 76, s. 5).

There were various kinds of peculiars. “The word *primâ facie* is to be understood of him who has a co-ordinate jurisdiction with the bishop. There are (1) peculiars of archdeacons, which are not strictly peculiars, but are subject to the bishop of the diocese; (2) peculiars not subject to the ordinary, but to the archbishop; (3) peculiars subject neither to the ordinary nor to the archbishop” (Lord Holt, C.J., *Johnson v. Ley*, 1695, Skin. 589). The more common kind of peculiars are those in which the bishop has no concurrency of jurisdiction, and which are exempt from his visitation. These have their appeals directly to the archbishop, and not to the diocesan within the circle of whose diocese they are locally situated. There is a third kind of peculiar, which is subject to the bishop’s visitation, jurisdiction, and sentence, and appeal goes from the peculiar to the diocesan (Sir J. Nicholl, *Parham v. Templer*, 1820, 3 Phillim. 242).

Burn classifies peculiars as “(1) royal, or the King’s free chapels (such as the Chapel Royal, St George’s, Windsor, and Westminster Abbey); (2) peculiars of archbishops, which sprung from a privilege they had to enjoy jurisdiction in such places where their seats or palaces were, and there are more than a hundred of these in the Province of Canterbury, and their jurisdiction is administered by several commissaries, the chief of whom is the Dean of the Arches for the thirteen peculiars in the City of London; (3) peculiars of bishops, *e.g.* the Bishop of London has four in the diocese of Lincoln, and a bishop may exercise episcopal jurisdiction in a house which he has in the diocese of another bishop; and a bishop may have a peculiar in his own diocese exclusive

of archidiaconal jurisdiction, such as religious houses by the ancient canon law; (4) peculiars of deans, deans and chapters, prebendaries (and canons, rectors, and vicars—Stephens, *Ecclesiastical Statutes*, i. 249, 250), these being places where by ancient compositions bishops have parted with their jurisdiction as ordinaries to these societies (Burn, *Eccles. Law*, 'Peculiar'); and so there may be peculiars of archdeacons which are exempt from the jurisdiction of the bishop, and appeal from all these goes to the archbishop (*Johnson v. Ley*, above; *Robinson v. Godsalve*, 1696, 1 Raym. (Ld.) 123).

"Peculiars of deans, though they have power to appoint commissaries for probate of wills and ordinary administration of justice, yet are subject to the triennial visitation of the bishop (Stephens, above). Peculiars belonging to monasteries were put under the jurisdiction (as well as visitation, to which they were subject before) of the ordinary of the diocese wherein they were interested, or such ordinary as the King should appoint, by 31 Hen. VIII. c. 13" (Burn, above). Such peculiars exercised all the ecclesiastical jurisdiction in respect of probate of wills of personalty, intestacy, and grant of marriage licences; and they have still the right to exercise the latter power, concurrently with the bishop of the diocese (1847, 10 & 11 Vict. c. 98, s. 5).

The exemption enjoyed by peculiars from the jurisdiction of the ordinary is now (as stated above) largely abolished. Formerly no exemption granted to persons under the degree of bishop extended to allowing them to employ any bishop they could procure to perform for them merely episcopal acts, without special words to that effect in the exemption; but all such acts had to be performed by the bishop of the diocese within which the peculiar was situate, *e.g.* in granting letters dimissory, consecrating or reconciling churches and churchyards (Burn, *Peculiar*), and in cases of heresy, the bishop had sole jurisdiction (Phillimore, *Eccles. Law*, 927). In the time of Henry VIII. and Edward VI. the Ecclesiastical Commissioners recommended that the bishop's power with regard to discipline should extend to peculiars, and that their contentious and voluntary jurisdiction should be abolished; and the Act of Uniformity, 1558, 1 Eliz. 2, empowered bishops and their officers to proceed, for the purpose of enforcing the Act, in places otherwise exempt from their jurisdiction. In 1838, under the Act for abridging pluralities and better providing for benefices, archbishops and bishops were given jurisdiction, for the purposes of the Act, over all peculiars in their province or diocese, and all concurrent jurisdiction was abolished (1 & 2 Vict. c. 106, ss. 108, 109).

By the Church Discipline Act, 1840, 3 & 4 Vict. c. 86, all proceedings against clerks in holy orders must take place before the bishop of the diocese, and all places formerly exempt and peculiar are made subject, for purposes of the Act, to the ordinary of the diocese wherein they are situated (ss. 2, 22); and by the above Act of 1847, 10 & 11 Vict. c. 98 (an annual Act, but continued yearly), the bishop of every diocese, by himself or his officers, exercises jurisdiction throughout his diocese. By the Ecclesiastical Leasing Act of 1842, 5 & 6 Vict. c. 27, s. 6, bishops having jurisdiction over peculiars may execute in those peculiars the powers given by the Act to the bishop of the diocese; but where there are peculiars not belonging to any bishop or archbishop, such powers are to be executed by the bishop of the diocese in which such peculiars are locally situate.

[*Authorities.*—Phillimore, *Eccl. Law*, 2nd ed.; Stephens, *Laws of the Clergy*, and *Ecclesiastical Statutes*; Burn, *Ecclesiastical Law*.]

Peculiars, Court of.—The Court of Peculiars was the Court exercising jurisdiction over certain peculiars of the Archbishop of Canterbury, viz. thirteen parishes, including Bow, and the deaneries of Croydon and Shoreham; and the judge of it was the Dean of the Arches. In the other peculiars of the diocese of Canterbury the jurisdiction was exercised by commissaries, from whose sentence an appeal lay to the Court of Arches, as the Court of the Official Principal of the Archbishop or Dean of the Arches (Dr. Phillimore, note to *Aughtie v. Aughtie*, 1810, 1 Phillim. 201; *Fagg v. Lee*, 1873, L. R. 4 Ad. & Ec. 135). Proceedings in the Peculiars Court were regulated by statute in 1829 (19 Geo. IV. c. 53). An appeal lay from the Dean of the Arches to the Official Principal of the Arches Court of Canterbury, but in practice both offices were held by the same person. No Dean is now appointed: see under PROVINCIAL COURTS.

Pecuniary Causes.—So styled are those injuries to private persons or individuals which are cognisable in the Ecclesiastical Courts, not for the purpose of reforming the offender, as in the case of immorality, but for the purpose of making satisfaction to the party injured for the damage sustained. Blackstone (3 *Com.* 88) distinguishes them from MATRIMONIAL and TESTAMENTARY CAUSES. The chief pecuniary causes arise from the subtraction or withholding of tithes from the parson or vicar, the non-payment to the clergy of ecclesiastical dues, such as pensions, mortuaries, compositions, and the like, and the doing or neglecting to do acts relating to the Church whereby damage is caused. As to the subtraction of tithes, cases of that description will now be rare; for, by the 7 & 8 Will. III., 1695, c. 6, as extended by 53 Geo. III., 1813, c. 127, s. 4, tithes of a less value than £10 are recoverable summarily before justices, and under 6 & 7 Will. IV., 1836, c. 71, money payments have been almost universally substituted for payments in kind. Also it has always been the rule that whenever the right to tithes is called in question, unless between spiritual persons, the action must be tried in the common-law Courts, as the temporal inheritance and real property would be affected (2 *Co. Inst.* 364, 489, 490; 2 *Roll. Abr.* 309, 310). But tithes below the value of £10 cannot be sued for in the common-law Courts (5 & 6 Will. IV., 1835, c. 74). Actions for pensions, mortuaries, compositions, offerings, surplice fees, etc., are also now rarely brought in the Ecclesiastical Courts, for if below the value of £10 they are recoverable summarily before justices (7 & 8 Will. III., 1695, c. 6; 53 Geo. III., 1813, c. 127). So, too, if the dues claimed are contrary to the common law, prohibition will issue against the spiritual Courts dealing with the matter (*Dean and Chapter of Exeter's Case*, 1705, Salk. 334; *Bishop of St. David's v. Lucy*, 1698, 1 Raym. (Ld.) 447; *Burdeaux v. Lancaster*, 1697, Salk. 332).

Other pecuniary causes cognisable in the Ecclesiastical Courts are: in respect of fees settled and acknowledged to be due to the officers of such Courts, though not where the right thereto is called in question; in respect of a licensed curate's salary, though not if he is not licensed, or is under some special agreement with the rector; in respect of spoliation, or the taking of the profits of a benefice by a clergyman having no title thereto; and in respect of dilapidations. As to curates' salaries, the 1 & 2 Vict., 1837, c. 106, now provides for the allotment of these by the bishop, and by sec. 90 any agreement by a curate to take less than the salary so allotted is void. Payment of such salaries is enforced by

monition and sequestration of the profits of the benefice, issued by the bishop on the application of the curate. As to spoliation, the remedy is a decree to account for the profits wrongfully taken. Incidentally, other questions may be decided, as, for example, if a patron makes two presentations to the same living, the presentee not in possession may sue on the ground of spoliation, and the result will determine the validity of the appointment. But if the right of patronage be in question, the Ecclesiastical Courts will have no jurisdiction. As to dilapidations, see DILAPIDATIONS, ECCLESIASTICAL.

Pecuniary Consideration.—It is an established principle of English law that all contracts not under seal must be supported by some existing valuable consideration, that is to say, money or money's worth or marriage, otherwise they will not be enforced (see CONTRACT, Vol. III. p. 537). Marriage, however, is not money's worth (at all events within the Succession Duty Act, 1853, 16 & 17 Vict. c. 51, s. 17; *Floyer v. Bankes*, 1863, 33 L. J. Ch. 1; *Wolverton v. Attorney-General*, [1898] A. C. 535). What follows will therefore be confined to the case of money or money's worth. A primary question is as to how far such consideration must be adequate; and here the rule is that, in simple contracts or promises, the value or extent of the consideration will not be weighed provided there is *any* consideration (*per* Lord Ellenborough in *Phillipps v. Bateman*, 1812, 16 East, at p. 372), that is, any consideration of some value (*Townend v. Toker*, 1866, L. R. 1 Ch. 446, 458; *Cheale v. Kenward*, 1858, 3 De G. & J. 27; 44 E. R. 1179). At the same time money need not actually pass; for example, where a balance is due on cross accounts, the cross charges are really pecuniary considerations for discharge apart from the balance (*Holland v. Russell*, 1861, 30 L. J. Q. B. 308, 313; *Callander v. Howard*, 1850, 10 C. B. 290; *Credit Co. v. Pott*, 1880, 6 Q. B. D. 295). A pecuniary consideration must, however, be existing, and if it turn out to be past, the contract based on it will be *nudum pactum* (*Eastwood v. Kenyon*, 1840, 11 Ad. & E. 438, 451; 52 R. R. 400; *Jeremy v. Goochman*, 1596, Cro. (Eliz.) 442; 78 E. R. 683). On the other hand, if a tenant holds over after a notice to quit or after the expiration of his lease, and the landlord has had to pay damages to some prospective tenant, there will be a good implied contract to recompense the landlord for such damages (*Bramley v. Chesterton*, 1857, 2 C. B. N. S. 592). As to the kind of payment, if it is good by the law of the country where made, it will be good here (*Ralli v. Dennistown*, 1851, 6 Ex. Rep. 483).

Difficult questions frequently arise where the consideration is not money, but a bill of exchange or promissory note or the like. Generally speaking the acceptance of a document of that description when a debt is due only gives an extended credit, that is, postpones the actual date for payment, so that the creditor, notwithstanding such acceptance, may sue for the original debt (*In re London, Birmingham, and South Staffordshire Bank*, 1865, 34 L. J. Ch. 418; *Sayer v. Wagstaff*, 1844, 5 Beav. 415, 423; 49 E. R. 639; 59 R. R. 540; *Rumball v. Murray*, 1789, 3 T. R. 298). See also PAYMENT. The giving of a promissory note for rent does not extinguish the debt, nor in itself even suspend the remedy of distress. This because rent is a debt of equal degree with specialty (*Davis v. Gyde*, 1835, 2 Ad. & E. 623; 41 R. R. 489; *Palmer v. Bramley*, [1895] 2 Q. B. 405). The question whether there is accord and satisfaction is a question of fact in each case (*Day v. M'Lea*, 1889, 22 Q. B. D. 610; see ACCORD

AND SATISFACTION). The presumption, then, will be against the discharge of the debt by such bill or note, and all liens and other remedies will be available to the creditor (*In re London, Birmingham, and South Staffordshire Bank*, 1865, 34 Beav. 332). On the other hand, if there is evidence that the acceptance of the bill or note was to be a discharge, that construction will be enforced, as if the bill or note accepted is payable to a third person, or his order, or to bearer, or by a third person (*Belshav v. Bush*, 1851, 11 C. B. 191; *Fearn v. Cochrane*, 1847, 4 C. B. 274; *Price v. Price*, 1847, 16 Mee. & W. 232; 73 R. R. 476; *James v. Williams*, 1845, 13 Mee. & W. 828; *Simon v. Lloyd*, 1835, 2 C. M. & R. 187). And the same result will follow where the creditor has apparently taken upon himself the risk of the bill or note being met at maturity, or where he is guilty of laches in not duly presenting it or giving notice of its dishonour (*Peacock v. Pursell*, 1863, 14 C. B. N. S. 728; *Caine v. Couston*, 1863, 1 H. & C. 764; *Sard v. Rhodes*, 1836, 1 Mee. & W. 153). So, too, the original debt will be discharged where the creditor on presenting a draft to a banker or drawee has the opportunity of getting cash, but takes a bill or note instead thereof (*Strong v. Hart*, 1827, 6 Barn. & Cress. 160; 30 R. R. 272; *Marsh v. Pedder*, 1815, 4 Camp. 257); as also if he receives a cheque and keeps it an unreasonable time before presenting it to the banker, and the latter in the meantime becomes insolvent (*Hopkins v. Ware*, 1869, L. R. 4 Ex. 268; *Chamberlyn v. Delarive*, 1767, 2 Wils. 353; cp. *Poole v. Cabanes*, 1799, 8 T. R. 328).

Bank notes, payable to bearer and transferable on delivery, have always been considered as money (*Raphael v. Bank of England*, 1855, 17 C. B. 161; *Wright v. Reed*, 1790, 3 T. R. 554; *Miller v. Race*, 1758, 1 Burr. 452), even country bank notes (*Morris v. Wall*, 1798, 1 Bos. & Pul. 208; *Cousins v. Thompson*, 1795, 6 T. R. 335).

The term "pecuniary consideration" does not, however, include the surrender of a life interest in a sum of money and a contingent interest in the corpus, at all events within 53 Geo. III. (1814), c. 141, which replaced the 17 Geo. III. (1777), c. 26 (*Evatt v. Hunt*, 1853, 22 L. J. Q. B. 348; *Blake v. Attersoll*, 1824, 2 Barn. & Cress. 875), or the grant of an annuity charged on land (*James v. James*, 1821, 2 B. & B. 702), or a transfer of stock (*Cumberland v. Kelley*, 1833, 3 Barn. & Adol. 602), or the resigning a situation or giving up of business (*Hutton v. Lewis*, 1794, 5 T. R. 639; *Crespigny v. Wittenoom*, 1792, 4 T. R. 790).

Pecuniary Legacy.—See WILL, *Judicial Glossary*.

Pedigree, Proof of.—The matters which have to be proved to establish a pedigree are births, deaths, and marriages. Legitimacy is generally proved, or may be presumed, when the date of the birth and the previous marriage of the parents is proved (see PRESUMPTIONS). But independent evidence may be necessary in cases where the facts to establish the presumption cannot be proved, or there is evidence to rebut it.

Parol Evidence.—Upon all these facts direct or circumstantial parol evidence may be given (*R. v. Allison*, 1806, Russ. & R. 108; *R. v. Mainwaring*, 1856, Dears. & B. C. C. 132).

Registers.—The above facts may also be proved by certified copies of, or extracts from, registers of birth, baptism, marriage, death, and burial, kept (in this country) in accordance with various statutes, or in accord-

ance with ecclesiastical law. Such certificates prove, in addition to the principal facts, such other particulars, including in nearly all cases the date, as are required by law to be entered in the register (*Wiheu v. Law*, 1821, 3 Stark. 63; 23 R. R. 757; *R. v. Clapham*, 1829, 4 Car. & P. 29; 34 R. R. 770; *R. v. North Petherton*, 1826, 5 Barn. & Cress. 503; 29 R. R. 305; *Irish Society v. Bishop of Derry*, 1846, 12 Cl. & Fin. 641, *per Park, B.*, p. 669; 8 E. R. 1561; 69 R. R. 150. As to date in certificate of birth, see *In re Wintle*, 1870, L. R. 9 Eq. 373; and in certificate of baptism, see *Glenister v. Harding*, 1885, 29 Ch. D. 985). Such certificates are receivable in evidence on their mere production (14 & 15 Vict. c. 99, s. 14; *R. v. Weaver*, 1873, L. R. 2 C. C. R. 85; *In re Hall*, 1852, 22 L. J. Ch. 177; *In re Porter's Trusts*, 1856, 25 L. J. Ch. 688; but as regards certificates of baptism, see *Walker v. Beauchamp*, 1834, 6 Car. & P. 552). Evidence must be given to identify the persons named (*R. v. Weaver, supra*; *Parkinson v. Francis*, 1846, 15 Sim. 160).

As to the various registers and their contents, see BIRTHS, REGISTRATION OF; DEATH, REGISTRATION OF; BURIAL; REGISTRAR-GENERAL.

Declarations (q.v.) of deceased persons relating to the matters in question are also admissible in pedigree cases (*Goodright v. Moss*, 1777, 2 Cowp. 591; *Davies v. Lowndes*, 1843, 7 Sco. N. R. 141, 208; 64 R. R. 783; *Monkton v. A.-G.*, 1831, 2 Russ. & M. 147; 39 E. R. 350; 34 R. R. 38).

The declarations must have been made by persons related by consanguinity to the family, though the particular degree of relationship need not be proved. Declarations by a husband as to his wife's family and legitimacy, and by a wife as to those of her husband, are also admissible, but not those of servants (*Davies v. Lowndes, supra*; *Shrewsbury Peerage*, 1858, 7 H. L. C. 1; 11 E. R. 1; *Johnson v. Lawson*, 1824, 2 Bing. 86; 27 R. R. 558; 9 Moo. 183; *Vowles v. Young*, 1806, 13 Ves. 140; 33 E. R. 247; 9 R. R. 154). Illegitimate relationship is not enough (*Doe v. Barton*, 1827, 2 Macl. & R. 28; *Crispin v. Doglioni*, 1863, 3 Sw. & Tr. 44).

But a parent's declarations as to the child's birth and illegitimacy are admissible (*In re Thompson*, 1887, 12 P. D. 100; *Murray v. Milner*, 1879, 12 Ch. D. 849; *The Poulett Peerage*, [1903] A. C. 395); as also are the declarations of a deceased person as to his own legitimacy (*In re Perton*, 1885, 53 L. T. 707).

The declaration must have been made *ante litem motam*, but may have been made for the express purpose of proving pedigree (*Berkeley Peerage*, 1811, 4 Camp. 401; 14 R. R. 782; *Lovat Peerage*, 1885, 10 App. Cas. 763; *Sheddon v. Patrick*, 1860, 2 Sw. & Tr. 170; *Butler v. Mountgarret*, 1859, 7 H. L. C. 633; 11 E. R. 252; *Dysart Peerage*, 1881, 6 App. Cas. 489, 507; *Doe v. Davies*, 1847, 10 Q. B. 315).

The declarations may be in any form; letters, oral statements, entries in family Bibles, recitals and descriptions in deeds and wills, inscriptions on tombstones, rings, etc. (*Berkeley Peerage, supra*; *Goodright v. Moss, supra*; *Stanley v. Wade*, 1836, 1 Myl. & Cr. 355; 40 E. R. 404; 7 Sim. 595; 58 E. R. 965; *Monkton v. A.-G., supra*; *Vulliamy v. Huskisson*, 1838, 3 Y. & C. 80; *De Roos Peerage Case*, 1803, 2 Coop. 542; *Glenister v. Harding*, 1885, 29 Ch. D. 985; *Vowles v. Young, supra*; *Hubbard v. Leas*, 1866, L. R. 1 Ex. 255).

They may themselves be founded, not on the declarant's personal knowledge, but on family tradition and reputation (*Doe v. Griffin*, 1812, 15 East, 293; 13 R. R. 474; *Monkton v. A.-G., supra*; *In re Perton, supra*).

To prove *marriage*, evidence of general reputation is admissible (*Lyle v. Ellwood*, 1874, L. R. 19 Eq. 98; *Murray v. Martin*, *supra*; *Doe v. Fleming*, 1827, 4 Bing. 266; 29 R. R. 562; *Evans v. Morgan*, 1832, 2 Car. & Jer. 453; *Limerick v. Limerick*, 1863, 4 Sw. & Tr. 252), also evidence of the conduct of the parties towards each other; and declarations made by the parties or other persons may be admissible to prove marriage or legitimacy even during the lives of the declarants as part of such conduct (*R. v. Wilson*, 1862, 3 F. & F. 119; *Woodgate v. Potts*, 1847, 2 Car. & Kir. 457; *De Thoren v. A.-G.*, 1876, 1 App. Cas. 686. And see *The Aylesford Peerage*, 1885, 11 App. Cas. 1)—(letters of the mother admissible on a question of legitimacy as part of the *res gestæ*); and *Burnaby v. Baillie*, 1889, 42 Ch. D. 282 (evidence of verbal statements of an adulterer made previously to the birth of a child admitted as evidence of conduct tending to show that he was the father of the child). The falsification of pedigrees is punishable under 22 & 23 Vict. c. 35, s. 24.

See also PERPETUATING (PERPETUATION OF) TESTIMONY.

Pedlars.—See HAWKERS AND PEDLARS.

Peel Acts.—See ECCLESIASTICAL COMMISSIONERS, Vol. V., at p. 47.

Peerage.

TABLE OF CONTENTS.

Historical Review	13	Numbers	19
Peerage, Hereditary	14	Abeyance	19
Classification	15	Surrender	21
Barons	15	Attainder	21
Earls	16	Privileges	22
Dukes	16	Disabilities	23
Marquises	17	Children of Peers	23
Viscounts	17	Creation	24
Limitations on Creation	18	Authorities	24
Course of Descent	18		

The peerage of the United Kingdom of Great Britain and Ireland is an order of the State consisting of various ranks and degrees, the members of which possess certain personal dignities or titles of honour, usually transmissible to their descendants in a prescribed course of succession, and carrying certain privileges peculiar to the order.

The earliest recorded use of the term “peer of the realm” occurs in the year 1322 in a document exhibiting charges against the Despencers. These charges were held proven by the “earls, barons, and other peers of the land,” and judgment given by “us, peers of the land, earls and barons, in the presence of our Lord the King” (Stubbs, *Const. Hist.*, vol. ii. p. 347; Pike, *Const. Hist. of the House of Lords*, pp. 157 *et seq.*).

There has always been considerable discussion as to when the bishops and abbots ceased to be regarded as peers, for peers they certainly were in early parliamentary times. In Norman days the tenure of their lands was by barony, and there seems little doubt that their summons, like that of their lay brethren, was mainly an incident of tenure. Tenure, however, was not the only reason for their summons, as it seems clear that some at least of the abbots held their lands in free alms and not by barony, and yet received summonses. Apart from

tenure their position was doubly important, for they were *ecclesiastes et sapientes*, and their office must have operated as much as anything else to cause their being summoned as councillors of the Crown, just as it had secured their right to attend the Saxon Witan. Their writs, unlike those of the lay barons, were issued with regularity. By their own action, however, they cut themselves off from the peerage, and while always remaining Lords of Parliament lost the principal privileges of peers, *i.e.* the right to judge and to be judged by their fellows. The bishops in any judicial proceedings taken against them always abstained from claiming privilege of peerage; they simply denied that they were in any way amenable to secular authority. At the same time, while they refused to sit in judgment on their fellows in peril of life and limb, thus acting in obedience to the canons of holy Church, and always withdrew from such proceedings, they still desired to retain all other privileges belonging to the peerage. The Archbishop of Canterbury claimed for his order, in the proceedings against De Vere and De la Pole in the reign of Richard II., that its members were entitled to be present in all Parliaments as "peers of the realm," and then explaining that the nature of the proceedings compelled them to retire, stated that they intended to do so, but "saving always the right of our peerage" (Pike, *ibid.*, p. 160). This attitude eventually led not only to their failing to establish the special privilege they sought but to the loss of what they already held—their position as peers. In the reign of Henry VII. they were no longer styled peers but Lords of Parliament. Then followed the dissolution of the monasteries, and with it practical annihilation of the power of the remnant of churchmen left in the House of Lords. In 1592 a resolution was passed by the Lords denying to the bishops the status of peers, and in 1640 they were by Act of Parliament deprived of their seats in Parliament. They were again replaced in their former position by Parliament when Charles II. was restored (13 Chas. II. st. 1, c. 2). To-day the temporalities of their sees are vested in others, and their presence in the House of Lords arises from office alone. There are now always ten bishops without seats in the House of Lords, the Acts of Parliament creating new sees providing that there shall be no addition to the number of bishops entitled to sit. Of thirty-six sees now existing the holders of Canterbury, York, London, Durham and Winchester always sit, the remaining twenty-one seats being occupied by the next twenty-one bishops according to seniority of appointment to the Episcopal bench. Peers though the bishops undoubtedly were in the past, and holders by barony, to-day they sit *ex officio*, and do not hold an acre of land. See further on the position of the bishops, Coke, 3 *Inst.* 30; Hallam, *Middle Ages*, vol. iii. p. 5; Pike, pp. 151 *et seq.*

Another Lord of Parliament to whom the term "peer" is often wrongly applied is a Lord of Appeal in Ordinary, who is spoken of as a "life peer." These four lords are not peers but statutory Lords of Parliament. They hold their seats for life only and pass on neither honours nor dignities to their descendants. To use the old term, their blood is not "ennobled," and if by any chance it were ever necessary to arraign one of them for trial he would go before the ordinary tribunals of the country and not before the peers.

In its strict application then the term peerage is confined to the hereditary nobility. Previous to the Union with Scotland, in 1707, England, Scotland, and Ireland had separate peerages, the members of which sat

each in their own Parliaments. The Union of Scotland with England in 1707 put an end to the Scottish Parliament. The Act of Union provided that (1) the Scottish peerage should remain in existence; (2) no further creations should be made in it; and (3) sixteen of its members should be elected for the term of every Parliament to represent their order in the House of Lords of the Parliament of Great Britain. After the Union, for all future creations, the peerage of England became the peerage of Great Britain. In 1800 Ireland was united to Great Britain and lost its separate Parliament. The Irish peerage was to continue and not to fall below 100 (exclusive of peers holding peerages entitling them to sit as Lords of Parliament). When the maximum is reached a new Irish peer may be created only on vacancies occurring by extinction of an Irish peerage or creation or succession by an Irish peer to a peerage entitling the holder to sit by hereditary right in the House of Lords. The Irish peerage send twenty-eight of their number, elected for life, to represent them in the Parliament of the United Kingdom. From 1800 to 1869 they also sent one archbishop and three bishops, but these lost their seats when the Irish Church was disestablished in 1867. Since the Union with Ireland the peerage of Great Britain has been the peerage of the United Kingdom of Great Britain and Ireland.

The peerage may be classified as follows:—

1. *Peers of England*, holding peerages created previous to the Union with Scotland in 1707, all of whom are Lords of Parliament.

2. *Peers of Great Britain*, holding peerages created since 1707, but before the Union with Ireland in 1800, all of whom are Lords of Parliament.

3. *Peers of the United Kingdom*, holding peerages created since the Union with Ireland in 1800, all of whom are Lords of Parliament.

4. *Peers of Scotland*, holding Scottish peerages created previous to the Union with England. Sixteen of these, elected by their order for each Parliament, are Lords of Parliament.

5. *Peers of Ireland*, holding Irish peerages created before (and since) the Union with Great Britain. Twenty-eight of these, elected by their order for life, are Lords of Parliament.

Many individuals belong to more than one of the above classes, and one might, as a matter of fact, belong to all five (*e.g.* take the case of an Irish peer (5) created a baron of England say in 1700 (1); he marries a Scottish peeress in her own right (4); their son on the death of his parents is a peer of England, Scotland, and Ireland. In 1750 the son is created an earl. He then becomes also an earl in the peerage of Great Britain (2); his descendant (living after 1800) if given a further step in the peerage of the United Kingdom would then hold peerages of each of the classes above mentioned.

The remainder of this article deals mainly with the peerages of England, Great Britain, and the United Kingdom, but where there is any variation in the law with respect to Scotland and Ireland this will be mentioned.

The various ranks of the peerage are not of equal antiquity; they will be dealt with in order of time.

Barons were originally peers because they held by barony, *i.e.* held sufficient land in such a way as entitled them to receive a personal summons from the Crown to attend Parliament. In the reign of Henry III. tenure alone ceased to qualify for a summons, the Crown using its pleasure as to whom, from among the great landowners, it would summon.

These summonses were frequently intermittent (many persons never received more than one summons, others two or three at long intervals), and were not at first regarded as conveying any hereditary right to attend Parliament. In course of time, as the idea of burden in attending Parliament faded away, the personal writ of summons began to be regarded as a distinction, and therefore was eagerly sought after. The descent of land had for some time crystallized into the custom of primogeniture, and its principle gradually came to be applied to dignities also. In 1387 Richard II. created a barony by patent, and from that date creations of baronies by writ and patent continued side by side, the later method gradually superseding the earlier. During the last two or three centuries the method of creation by writ, except in the case of calling up an eldest son in a barony belonging to his father, has seldom been used. See BARONY herein, which details the different kinds of baronies now in existence.

Earls.—Various suggestions have been made as to Saxon or Norman origin of a high official nature, but historical opinion seems generally to incline towards the theory that the term was a name of dignity—conferred by royal prerogative on a person already classed among the *maiores barones of Magna Carta*. At first the dignity was not even hereditary, and the name of a county, of which he is said to have been an officer in the King's name, was not essential to his dignity as an earl. There were also Scotch and Norman earls, and commonly so addressed, but in England only rated as barons. On the creation of an earl, it was customary in support of the dignity to give him a fixed proportion of the revenue arising from the pleas of the county from which he took his title. The usual early form of creation was by investiture, a ceremony in which the new earl was girded with a sword by the King in the sight of one of the great assemblies. Later a charter was also granted, setting out the gift above mentioned, and later still (after the hereditary principle with regard to dignities had become customary) the devolution of the earldom was carefully prescribed. The earls always received individual summonses to Parliament by the name of earl, but there is reason to believe, in early days at any rate, that they sat, not because they were earls, but because they were barons also. The early earldoms were granted to the first holder "and his heirs," and though the point has never yet been settled legally, and the grant probably operates so as to place such earldoms as regards succession in the same position as baronies by writ. This point is dealt with under *Abeyance, infra*. Very soon earldoms came to be granted by patent only, the succession usually being fixed on the heirs male of the body of the first holder.

Dukes.—This title was first granted in 1337 to the Black Prince by Edward III. in the name of "Duke of Cornwall," "*et ipsius et hæredum suorum Regum Angliæ filiis primogenitis*" (8 Co. Rep. 27 a; 77 E. R. 513). Subsequently several members of the royal family were created dukes, but no subject received such an honour until twenty years later, when Richard II. created his favourite, De Vere, Earl of Oxford, Duke of Ireland. The title was probably borrowed from the Continent, where it had long been well known, the Conqueror himself having been Duke of Normandy. The original intention may have been to confine it to the blood-royal, as with the exception of De Vere it was some years before a dukedom was again conferred on a subject. The creation has always been by letters patent, and (where not a personal dignity for life) on the first holder and (usually) the heirs male of his body.

Marquises.—In 1386 Richard II. created De Vere, Earl of Oxford, Marquis of Dublin for life, and thus imported an entirely new and unknown title into the peerage. The grant, however, was for life only, and was, in fact, surrendered the year following upon De Vere's promotion to the Dukedom of Ireland. The title, not being understood, fell into disrepute among the peers, and it was not until eleven years had gone by that another creation was made, this time in favour of one of the blood-royal, John de Beaufort, eldest legitimated son of John of Gaunt, who became Marquis of Dorset. His title was shortly afterwards taken away by Henry IV.'s first Parliament. Subsequently creations were made only at long intervals, that of Winchester (1571) being the only one (of old date) under which an English marquis at present sits in the House of Lords. The origin of the title is probably foreign. Many derivations of it are given, that most accepted being *Marchio*, a name which is said to have been applied to the baron or earl who was supposed to preserve order on the "marches" of Wales and Scotland, but it is as likely the word was adopted from the German title of *Margrave* or *Markgraf*. The creation has always been by patent in favour of the male descendants of the first holder.

Viscounts.—Under this name Henry VI. added another rank, and the last in point of time, to the peerage, creating in 1440 John, Baron Beaumont, Viscount Beaumont, and giving him precedence next above the barons. The name of this dignity was also borrowed from the Continent, it having been in use for some time as a title of honour in the king's French possessions. Subsequently few creations were made; in the reign of Henry VIII. frequently only one viscount was summoned, and it was not until two hundred years after the first creation that the rolls of Parliament contained the names of nine viscounts. The creation, like those of duke and marquis, has always been by patent, and in favour of the male descendants of the first holder.

The titles of duke, marquis, and viscount have never carried with them any official position; they were arbitrary names of dignities, and, in early days, were conferred as additional honours on men who were already members of the peerage. Even at the present time, when a commoner is granted a peerage of higher dignity than a viscounty it is usual also to confer upon him one of lower rank, so that he may have a second title for his heir to bear by courtesy.

Though a peer may enjoy any number of peerages, he is known by the name of the dignity which gives him the highest precedence. It was once argued that whenever a barony by writ came into the possession of a person already a peer of higher rank, the higher peerage "attracted" or overshadowed the lower, which thenceforth followed the course of descent of the dignity which had attracted it. This is really a modified case of merger, but the doctrine is now exploded and cannot be regarded as applying to any case except that of the Crown. (*Baronies of Fitz-Walter*, 1660, and *De Ros (Roos)*, 1666. Collins's Claims, 168, 261.) Every peerage descends according to the limitations prescribed in its patent of creation, and where no patent exists (as in the case of baronies by writ, and probably some old earldoms) to heirs-general. The privileges of peerage are enjoyed only by the holders of peerages, and do not extend to their children. This rule is in direct opposition to that followed in most Continental countries, where nobility of blood extends to all descendants. In the United Kingdom a peer's children, though accorded courtesy titles and possessed by royal favour of special precedence, are

commoners. The position of a peer's wife will be discussed later. A peeress in her own right has all the privileges of peerage except a seat in the House of Lords, and that is denied her only because the common law does not permit a woman to sit in either House of Parliament.

Though the Crown, as the fountain of honour, is capable of granting any title or honour, new or old, which seems good to it, yet only the five ranks of the peerage above mentioned entitle their holders to sit in the House of Lords. The titles (or dignities) of Prince of Wales, Earl Marshal, Lord Great Chamberlain and Baronet are all hereditary, but none convey as such any right to a seat in the House of Lords.

The Limitations on the prerogative of the Crown in the creation of hereditary peerages whose holders may be entitled to a seat in the House of Lords are as follows:—

(1) Generally. The course of descent must be one known to the law. (a) A peer cannot be created for life with a denial of succession to his descendants unless it be as one of the Lords of Appeal in Ordinary under the Acts of 1876 and 1887. An attempt to introduce life membership of the House of Lords was made in the case of Sir James Parke, whom the Crown purported to create by patent Baron Wensleydale for life. A writ of summons was issued, but on its return the House of Lords refused to admit the new baron. It was not disputed that the Crown could create any person a baron or give him any other title or dignity for life, but it was firmly insisted on that if such a creation were made it could not carry with it any right to a writ of summons. It was pointed out that there had been no life creations for centuries, and that even those made in earlier times had been grants to women or persons already peers, and in no case had a life peer sat in Parliament by virtue of his life grant. The Crown ultimately acquiesced in the view of the Lords, and a new patent in the ordinary hereditary form was issued.

(b) Nor may a peerage be granted to follow any course of succession not known to the law. The course of descent in modern patents is invariably so marked out as ultimately to fix the peerage in some male line according to the custom of primogeniture, though the immediate successor of the first holder may be a woman or even a stranger in blood. The following instances may be cited: Amabell, Baroness Lucas, was in 1816 created Countess de Grey with a limitation to the heirs-male of her sister; a nephew afterwards succeeded her and the earldom is now fixed in tail male in the line of the present Marquis of Ripon. Other courses of descent known to the law are as follows: Fee simple, which probably operates as if to heirs-general, Earldoms of Oxford (1155) and Norfolk (1312), both probably now in abeyance; and Bedford (1367), extinct; to a second son, the eldest son being alive, Dukedom of Dover (1708) extinct, and Earldom of Cromartie (1861) called out of abeyance in 1895; a son-in-law and his heirs-male by the daughter of the first grantee, Earldom of Northumberland (1747); to an elder or younger brother and his heirs-male, Viscounty of Kitchener (1902) and Barony of Grimthorpe (1886). It is, however, not lawful for the Crown to make what is called a shifting limitation of a peerage, *i.e.* one which might vest a peerage in an individual, and then on a certain event happening (*e.g.* his succession to a peerage of higher rank) shift it from him to the representative of some other line. Such a limitation was held illegal in the *Buckhurst Case* (1864). It is also illegal for a peerage to be limited to the grantee and "his heirs-male for ever." Such a grant was that of the Earldom of Wiltes in 1398. The grantee died without issue but

left a male heir-at-law, whose descendant in 1869 claimed the earldom; but the original limitation was held invalid.

There is no limitation on the power of the Crown as to the number of United Kingdom peerages which may be created. As to Scotland, the Act of Union with that country operates to prevent any increase in the number of Scottish peerages, and consequently there have been no creations since 1707. The Irish peerage is supposed always to consist of one hundred Irish peers, possessed only of Irish peerages. The number is at present below the limit, and therefore the Crown is at liberty in the future to grant Irish peerages up to the limit. When the limit is reached no more peerages may be granted until existing ones become extinct, or their holders succeed to United Kingdom peerages. Only four Lords of Appeal in Ordinary may hold office at any one time. The number of archbishops and bishops capable of sitting in the House of Lords is fixed by statute at twenty-six, though, as pointed out previously, the spiritual lords are not now regarded as peers.

Since party government became the rule, new peerages have usually been created on the recommendation of the Prime Minister of the day, though the Crown, especially in considering the claims of Royal blood, is believed in some instances to take its own course; and, constitutionally, such action is entirely legal. By far the greater number of peerage honours granted during the last two centuries has been the reward of political services. Usually these services are well known, but there exist several instances in which the reasons for conferring the honour have not been quite clear. Until the reign of George III. the peerage was comparatively small, but that monarch issued no less than 388 patents of peerage. Many of these have become extinct or obscured by higher titles, but the general tendency is in the direction of a steady increase, and where the peers of Tudor times were counted by tens their successors of to-day are numbered by hundreds. The full body (*i.e.* if minors were of age and peeresses capable of sitting in the House of Lords) would be 545 English peers. The Irish peerage has 175 members, but 82 of these are also peers of the United Kingdom, leaving 28 representative and 65 without seats in the House of Lords. Of 87 Scottish peers 51 hold United Kingdom peerages, the remainder consisting of 16 representative and 20 without seats. Since the present Government came into power (December 1905), 22 United Kingdom peerages have been created.

Abeyance.—When, in the case of a peerage capable of descending to heirs-general, there exists more than one co-heiress, then inasmuch as the heirship of women is equal and a peerage cannot be held in common, there is no person capable of sole succession. This condition of things brings about what is called an abeyance. An abeyance is terminable in two ways—(1) By the prerogative of the Crown, and (2) by the extinction of all but one line of co-heirs. The prerogative of the Crown operates by naming one of the co-heirs to take up the peerage, or as the term is, there is “a calling out of abeyance” in favour of some particular individual. In earlier days the view was held that when a peerage went into abeyance it became at the absolute disposal of the Crown, but later law, which operates retrospectively, limits the Crown’s choice to some one of the heirs-general, and certainly not necessarily the representative of the senior line. There is no legal compulsion on the Crown to terminate an abeyance, the act of doing so being entirely a matter of grace arising out of an exercise of the royal

prerogative. (See Cruise on *Dignities*, 2nd ed., p. 181; Collins's *Claims*, 172; *Willoughby de Broke Peerage*, Cruise, 197; Collins, 321; *Beaumont Peerage*, 1794, Cruise, 214; *Camoy's Peerage*, 1838, 6 Cl. & Fin. 789; 7 E. R. 895.) There seems to be no reason why earldoms limited to heirs-general should not also be capable of going into abeyance. The point was exhaustively discussed in the *Earldom of Norfolk Case* in 1907, and is best examined in the printed report of the speeches of counsel. Decision was, however, given on another point. In 1895 the Crown, of its own motion, terminated the abeyance of the Earldom of Cromartie in favour of the present countess, so that the validity of this act has yet to be determined by the House of Lords. The Earldom of Ormonde (an Irish peerage, but the law is as the English on peerage descent) is stated to have become abeyant in 1515. The abeyance was terminated by Hen. VIII. in 1529 in favour of the son of the last heir-male's daughter (see Round's *Earldom of Ormonde* in Foster's *Coll. Gen.*, pp. 84, 93). There exist no dukedoms, marquises, or viscounties limited to heirs-general but on the principles above mentioned; if such were ever created they would be equally capable of going into abeyance. In Scotland there is no abeyance of peerages, as when a condition of co-heirship arises the eldest co-heir succeeds solely. The Irish law follows the English.

The procedure in seeking to call a peerage out of abeyance is as follows:—The co-heir petitions the Crown, through the Home Secretary, to terminate the abeyance, setting forth briefly the facts of the case, and his pedigree. The Crown then refers the petition to the Attorney-General, who gives notice to the petitioner of such reference. The petitioner then prepares his case in detail, setting forth all his proofs, and producing all his documents to prove the title, pedigree, and law in the matter. These documents are sent to the Attorney-General, and notice is given by the petitioner to all other co-heirs, whose pedigrees, as well as his own, the petitioner is required to prove. The Attorney-General then appoints a day for hearing the petitioner's case. If a *prima facie* case is established by the petitioner, a report is made to the Crown that the case is worthy of examination, and in this event the Crown refers the whole matter to the House of Lords. The House refers the claim to the Committee for Privileges, and the petition then proceeds practically on the lines of a House of Lords Appeal. It is open to the Crown immediately on receiving the Attorney-General's report to grant the prayer of the petition, but this course is seldom adopted unless both law and pedigree are perfectly clear, the abeyance recent, and no other persons claiming. A recent exception was the Earldom of Cromartie in 1895, somewhat unusual in view of the fact that the Crown thereby admitted the existence of abeyant earldoms. In an abeyance claim, in which no question of law is in issue, the petitioner has only to establish (1) his pedigree, showing co-heirship, and (2) the pedigree of, and notice sent to, the other co-heirs. This, if done to the satisfaction of the House of Lords, is duly reported to the Crown, which may, or may not, as a matter of grace, act upon it. Competing co-heirs do not "oppose" one another in the legal sense; all they are required to do is to prove their pedigrees to the satisfaction of the Committee for Privileges, the Crown being the final arbiter. To claim successfully the termination of an abeyance a co-heir need not by any means be of a senior line, as all co-heiresses are equal; and doubtless in deciding conflicting claims the

Crown, if it acted at all, would take into full consideration the capability of any individual petitioner to support the dignity sought for. Once an abeyance has been terminated the dignity descends in the new line. See also PRIVILEGES, COMMITTEE FOR.

Surrender.—It was the custom in the early days of the peerage for peers to surrender their dignities to the Crown, and frequently to receive them back with altered limitations. This procedure at that time was a common practice and undoubtedly regarded as legal, and to this day is accepted law as to Scottish peerages, though not in English. In 1663 the Crown, with the concurrence of its legal advisers, evidently considered that a peerage could be extinguished, for words importing such a doctrine appear in the patent of the *Barony of Lucas* granted in that year. There were, however, more than doubts even before then, as the peers had solemnly declared by resolution in 1640, "that no peer of the realm can drown or extinguish his honour (but that it descends unto his descendants) neither by surrender, grant, fine nor any other conveyance to the King." In 1678 the Lords were more definite still, and declared in the *Purbeck Case* (Cruise on *Dignities*, p. 113), "that no fine now levied or at any time hereafter to be levied to the King, can bar such title of honour (*i.e.* of a peer of the realm), or the right of any persons claiming under him that levied or shall levy such fine." These precedents were strictly followed in the recent *Earldom of Norfolk Case*, [1907] A. C. 10. From these cases the following rule of law may be deduced: In early days the Norman and Plantagenet Kings took upon themselves to deal with the baronage in a manner which, though illegal, was suffered because no one dared to oppose them; but, as time went on the peers, becoming stronger, were enabled to enforce their rights, and their resolutions in Stuart days were only declaratory of law which had always existed, but had been systematically disregarded by the Crown. This being so, resolutions of the peers deliberately and expressly laid down must, when in point, always be followed.

Attainder.—The legal definition of an "attainted" person is one upon whom judgment of death (whether actually carried out or not is immaterial) has been pronounced after a trial for treason or felony, or judgment on outlawry. Among other penalties attainder causes corruption of blood, *i.e.* no attainted person is personally capable of inheritance, nor can any other person inherit from or through an attainted person (Co. 1 *Inst.* 291*b*; Blackstone, *Com.*, vol. ii. p. 254). By a statute passed in 1285 (*De Donis Conditionalibus*) estates tail were made inalienable, and the principle of the statute was soon applied by the judges to cases of attainder (*Earl of Kent's Case*, Y. B. 7 Hen. iv. Mich. 19). By 26 Hen. viii. c. 13, all estates in land, including estates tail, became forfeitable for treason, but the Act did not apply to felony. Finally, in 1869, by 33 & 34 Vict. c. 23, forfeitures for treason and felony were abolished, and such crimes, excepting forfeiture on outlawry, no longer bring in their train attainder and corruption of blood. Peerage, in early days mainly a matter of tenure, naturally followed very closely for a long period the laws relating to the inheritance of land. There was at first some controversy as to whether a peerage in tail came within the Statute *De Donis*, but eventually this was decided in the affirmative. The question is fully discussed and settled in *Nevil's Case*, 1605, 7 Co. Rep. 33*a*; 77 E. R. 460. Peerages, being estates tail within the Statute *De Donis*, were not forfeitable for felony, 26 Hen. viii. c. 13, applying only to treason (Cruise on *Dignities*, 2nd ed., p. 123, ss. 72 *et seq.*), but in

the case of a dignity created by writ, which is descendible to heirs-general, the attainder of the heir-apparent for treason or felony, if he survives his ancestor, will destroy it. As Cruise says (*ibid.*, s. 76): "The heir-apparent is incapable of inheriting it in consequence of his attainder, and his blood being corrupted, no title can be derived through him, so that the dignity becomes vested in the Crown by escheat, and is thereby merged and destroyed as effectually as if it had been forfeited." But the attainder of a person who need not be mentioned in the derivation of the descent does not impede, *e.g.* A., a baron by writ, has two sons, B. and C. B. is attainted and dies in the lifetime of his father A. C. may succeed on the death of A., as he does not derive through B. Otherwise if B. had outlived A., as he would then have been his father's heir. So, also, a dignity in tail may be claimed by the son of an attainted father who was never in possession of the dignity, as the son is deemed to claim from the person who first held the dignity, *e.g.* John, first Duke of Atholl, died 1725, leaving two sons, James and George. The younger, George, was attainted of treason in 1745, dying in 1760, leaving a son John. James, second Duke of Atholl, died in 1764, without issue, and his nephew John claimed and was allowed the dukedom, his father never having held it (see the opinion of high authorities set forth in Cruise, p. 128, ss. 84 *et seq.*). In many cases special Acts of Parliament making attainders and forfeitures were passed, and these, of course, operated apart from the general law. In any case, attainder and forfeiture of a dignity, whether arising under the provisions of the common law or under special or general Acts of Parliament can only be reversed by Act of Parliament. Such reversals have, as a matter of course, occurred repeatedly throughout our history, though there are many dignities still under attainder. The procedure in reversing an attainder and recovering a dignity is as follows:—The Crown signifies its pleasure that a bill of restoration shall be prepared and signs it. The bill is then brought in to the House of Lords, passed there, and sent to the Commons for assent. The last bill of the kind became law in 1876, when Earl Cowper procured the removal of the attainder on one of his Ormond ancestors, and so became entitled to the Baronies of Butler of Moore Park (1663), and of Dingwall in the peerage of Scotland.

Privileges.—With the lapse of time many privileges have either dropped out of use or been forgotten. The most important now possessed by a peer are a seat in the House of Lords and the right of being tried by his peers. The conditions under which a seat as of right follows a peerage have been discussed above. In cases of treason and felony (but not of misdemeanor, which follows the ordinary procedure) a peer is triable by his peers only, and cannot waive this right (Coke, 3 *Inst.* 29; Kelyng's Rep. 56). See also *R. v. Lord Graves*, 1887, discussed in Hansard, 3rd ser., vol. 310, cols. 246 *et seq.*, where Lord Halsbury points out that the question of trial is rather one of jurisdiction fixed by law than one of privilege. When an indictment for treason or felony is found by the Grand Jury against a peer, the Lord Chancellor is acquainted with the fact by the presiding judge, and the case is brought by *certiorari* into the House of Lords. If Parliament is sitting, the trial takes place before the full House; if not sitting, before the Court of the Lord High Steward. Out of parliamentary session, a Lord High Steward is appointed *pro hac vice*, and sits alone as judge, ruling on all points of law and practice, the peers in such cases being merely judges of fact. In full Parliament, it is also usual to

appoint a Lord High Steward, but he acts then merely as President of the Court, and every peer has a right to vote on every question of law as well as of fact; the majority, in case of difference of opinion, deciding. In cases of trial before the King in Parliament, the judges of the High Court are summoned to attend, and to give their advice, if asked, on questions of law. A number of trials of both kinds are reported at length in Howell's *State Trials*. The last case was that of Earl Russell, for bigamy, reported [1901] A. C. 446. For historical details concerning the trial of peers, see Coke, 4 *Inst.* 58; *The Trial of Lord C.*, 1677, T. Jones, 54; Blackstone's *Com.*, vol. iv. p. 258; Pike's *Const. Hist. of House of Lords*, p. 209; Vernon-Harcourt's *His Grace the Steward and Trial of Peers*. Scottish and Irish peers, whether possessing seats in the House of Lords or not, are entitled to trial by peers.

Peeresses (whether such in their own right or by marriage) are entitled to trial by peers, but a widowed peeress (by marriage) forfeits her rights of peerage if she marries a commoner (Co. Litt. 166; *Cowley v. Cowley*, [1901] A. C. 450).

Peers with a seat in the House of Lords possess practically the same parliamentary privileges as do members of the House of Commons (*q.v.*). Among other privileges they have personal access to the Sovereign (Anson's *Law of the Constitution*, vol. i. p. 227); and are exempt from jury service (33 & 34 Viet. c. 77). In the House of Lords when a resolution is passed contrary to his sentiments any peer, by leave of the House, may "protest," that is, enter his dissent on the Journals of the House (Blackstone, *Com.*, vol. i. p. 162). Formerly a peer might vote by proxy (Blackstone, *ibid.*), but since 1868 there has been a standing order discontinuing this right. In accordance with resolutions passed by the two Houses, neither House has power by any vote or declaration to clothe itself with new privileges unknown to the law and customs of Parliament (*Commons Journal*, vol. xiv. p. 555). Peeresses and non-representative peers of Ireland and Scotland, have, with the exception of the right to sit in the House of Lords, every peerage privilege.

Peers are not supposed to take any part in Parliamentary elections, the Commons being jealous of their influence; but in spite of the annual sessional order reaffirming this rule, little practical attention is paid to it. Peers of the United Kingdom may not sit in the House of Commons, a member of which, by succeeding to a peerage, at once vacates his seat, whether he applies for his writ to the House of Lords or not. Peers of Scotland of any kind may not sit in the House of Commons, but non-representative peers of Ireland may sit there for any constituency outside Ireland.

As pointed out previously the children of peers are commoners. The eldest son of a peer of the rank of earl (and above) is known socially by the name of his father's next peerage, but the courtesy nature of such titles is clearly indicated in every public or legal document, the phraseology employed being "John Smith, Esq., commonly known as Viscount Blackacre." In some cases peers' eldest sons actually bear titles not possessed as peerage honours by their fathers, but inasmuch as such are only accorded by courtesy, no question of peerage privilege arises. The younger sons of dukes and marquises are entitled to prefix the appellation "Lord" to their Christian names, and the daughters of earls as well as of dukes and marquises are entitled similarly to style themselves "Lady." The younger sons of earls and all the younger children of viscounts and barons are entitled to the prefix "Honour-

able" to their Christian names. Usually when the direct heir of a peer dies his children are given, by the Crown, the courtesy titles and precedence they would have enjoyed had their father actually succeeded to the peerage.

Creation.—An alien may be created a peer, but while remaining an alien cannot sit in the House of Lords, nor, if a Scottish or Irish peer, can he vote at elections for representative peers.

Peerages may be created—(1) By writ of summons; (2) by patent. The writ of summons method is not now used except in the case of calling up an eldest son in the barony of his father. This does not create a new peerage, but only accelerates the heir's appearance in the House of Lords. On the father's death the peerage remains vested in the son. Should the son die without heirs, the peerage reverts in the father. The invariable method of creation in all ordinary cases is by patent. The letters patent describe the name of the dignity, the person upon whom it is conferred, and specify its course of descent. Every peer entitled receives a writ of summons to attend each Parliament, however his peerage has been created. Newly created peers are introduced into the House of Lords by two peers of rank equal to that of the new peer. All attend properly robed, being preceded by the Gentleman Usher of the Black Rod, by Garter King of Arms (or his deputy), and sometimes the Earl Marshal and the Lord Great Chamberlain are present. Since the reign of James I. there has been no investiture on the creation of peers, and in modern patents its public ceremony is expressly dispensed with.

[*Authorities.*—Dugdale, *Baronage*; Cruise on *Dignities* (1823 ed.); The House of Lords' *Report on the Dignity of a Peer* (1892 ed.); Hallam, *Middle Ages and Constitutional History*; Freeman, *Norman Conquest*; Round, *Peerage and Family History*; Pike, *Constitutional History of the House of Lords*; G. E. C.'s *Complete Peerage*; Vernon-Harcourt, *His Grace the Steward and Trial of Peers*; Palmer, *Peerage Law in England*; and the printed proceedings in various peerage cases before the House of Lords.]

Pellage.—The custom or duty paid for skins of leather (Rot. Parl. 11 Hen. iv.).

Penal Action.—A distinction is drawn by some authors between a penal action, which they define as an action for a statutory penalty, and a popular action (*actio popularis*) or *qui tam* action, which is brought by a common informer, who receives the whole or part of the penalty (3 Steph. Com.; 1 Chit. Gen. Pr. 25; 2 Chit. Archb.).

Whatever the correctness of this view in past times, the distinction is now obliterated, and penal action denotes a proceeding, civil in form, to recover a penalty imposed by statute by way of punishment, and not as compensation for a legal wrong (*Huntington v. Attrill*, [1893] A. C. 150).

The English Courts will not enforce the penal statutes of a foreign State (same case) but will use their own judgment, irrespective of foreign decisions, in determining whether a foreign law is or is not penal within the rule.

These proceedings were permitted by statute at a date when the position of misdemeanors in law was not fully established: when justices had no summary jurisdiction, and the police was inadequate to detect offences.

The policy of Parliament has for long been to treat acts and omissions

which, in the fifteenth and sixteenth centuries, would be the subject of penal actions, as petty misdemeanors punishable on summary conviction, and to substitute informations before a Petty Sessional Court for the old procedure by action or by information by the Attorney-General; and the Acts of 1575 (18 Eliz. c. 5; 31 Eliz. c. 5) and 1624 (21 Jas. I. c. 4) are repealed, so far as they relate to matters under penal statutes cognisable by a Court of summary jurisdiction.

The earliest reference to popular actions in a statute now in force is in 1488 (4 Hen. VII. c. 20). It is there recognised that the action depends on legislation passed to reform extortions, maintenances, oppressions, injuries, and wrongs affecting the public, which was liable to be defeated by collusive or friendly proceedings.

The only present importance of the Act of Hen. VII. is, that it avoids judgments in such actions obtained by collusion or covin without trial on the merits. In *Girdlestone v. Brighton Aquarium Co.*, 1878, 3 Ex. D. 137; 4 Ex. D. 107, the Courts came to the same conclusion without referring to the Act. In 1575 (18 Eliz. c. 5, s. 5) compounding a penal action without leave of the Court became, and still is, a misdemeanor triable at assizes or sessions, and punishable now by fine of £10 and by incapacity to sue (31 Eliz. c. 5, s. 1), and formerly also by pillory. The procedure for obtaining leave to compound a penal action, and the terms of its grant in the High Court, are regulated by R. S. C., Order 50, rr. 13-15.

Under the Acts the venue was local, even when the plaintiff was a party aggrieved (*Lewis v. Davis*, 1875, L. R. 10 Ex. 86). The provisions of the Acts of 1575 (18 Eliz. c. 5) and 1588 (31 Eliz. c. 5) and 1624 (21 Jas. I. c. 4) as to procedure are now superseded, so far as relates to local venue in civil proceedings, by the Judicature Acts and Rules, and, so far as relates to pleading the general issue, by the Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61.

The general rules with respect to penal actions are—

(1) That unless a right of action is expressly given to the informer or person aggrieved, it is recoverable only at the suit of the Attorney-General.

(2) That unless the penalty is given wholly or in part to the informer or a person aggrieved, it goes, when recovered, to the Crown (*Clarke v. Bradlaugh*, 1883, 7 App. Cas. 354).

(3) That actions by informers, where permitted, are their own actions, and not Crown suits (*Sedgwick v. Richardson*, 1692, 1 Lut. 197); and appear not to abate by the death of the informer, at any rate where the remedy is by action of debt.

(4) Corporations cannot sue as common informers unless expressly authorised by statute (see 52 & 53 Vict. c. 63, s. 2). It is uncertain whether this applies to criminal proceedings.

(5) The proceeding, though civil in form, is so far penal that discovery will not be given either of documents or by interrogatories (*Martin v. Treacher*, 1886, 16 Q. B. D. 507; *Mexborough (Earl) v. Whitwood Urban District Council*, [1897] 2 Q. B. 111).

This rule applies even where the penalty is given to a person aggrieved (*Saunders v. Wiel*, No. 1, [1892] 2 Q. B. 321). The doctrine was clearly recognised as early as 1569 (see *Inner Temple Documents*, vol. i. p. 51). For limitations on the rule, see *Mayor, etc., of Derby v. Derbyshire County Council*, [1897] A. C. 550.

(6) Proceedings by information in the High Court on a penal statute,

unless instituted *ex officio* by the Attorney-General, or authorised by a particular statute, can only be brought by the Master of the Crown Office by leave of the Court (4 Will. & Mary, c. 18, s. 1).

In deciding whether an action will lie for a statutory penalty, it is necessary to find express words or necessary implication to rebut the presumption that imposition of a penalty creates an offence punishable on indictment, and that even where the penalty is given to a particular person the procedure may still be criminal (see Craies, *Statute Law*, 425-446).

Limitations of the time for proceeding by action under penal statutes were imposed alone—

(1) In 1509 (1 Hen. VIII. c. 24), of one year by informer and four years by the King.

(2) In 1516 (7 Hen. VIII. c. 3), of one year by common informers, of two years by *qui tam* informers, of four years by the King.

(3) In 1588 (31 Eliz. c. 5, s. 5), of one year in the case of actions by persons suing *qui tam* or for themselves.

(4) In 1624 (21 Jas. I. c. 4), of one year by informers (*Dyer v. Best*, 1865, L. R. 1 Ex. 32).

The limitations do not apply when the particular statute specifies a different time of limitation (31 Eliz. c. 5, s. 6; *Robinson v. Currey*, 1881, 6 Q. B. D. 21; 7 Q. B. D. 465). The Act of 1588 extends to subsequent statutes, but that of 1624 (21 Jas. I. c. 4) does not (*Barber v. Tilson*, 1815, 3 M. & S. 429); and the latter Act (except sec. 4), being limited to proceedings by information *qui tam* or indictment, is now virtually inoperative (1 Wms. Saunders, 312*a*). The Act of 1588 does not now apply to proceedings to recover fines or penalties under the Income Tax Acts. See 7 Edw. VII. c. 13, s. 23 (1).

Under 3 & 4 Will. IV. c. 42, s. 3, actions for penalties, damages, or sums of money given to the party grieved, under any statute not specifying another limitation, must be brought within two years from accrual of the cause of action (see *Robinson v. Todd*, 1881, 6 Q. B. D. 21; 2 Q. B. D. 465).

Penal Servitude.—The common-law remedy by imprisonment did not reduce the prisoner to a servile status, and was not at first applied to persons convicted of treason or felony. The method of compelling felons to abjure the realm has long been in disuse; and the penalty of banishment has always been statutory only (*Portland (Countess) v. Prodgers*, 1689, 2 Vern. 104; 23 E. R. 677; Hawk, *P. C.*, bk. ii. c. 33, s. 137). Under an Act of 1597, 39 Eliz. c. 4, Parliament authorised the banishment and transportation of incorrigible rogues; and on the colonisation of Virginia, transportation under indenture of bond-service was recognised, and, in imitation of Spain, felons under sentence of death were reprieved on condition of such transportation and service. The practice continued during the Commonwealth, and at the Restoration it became usual to grant pardons conditional on bond-service for a term in America (Kelyng, *Cr. Cas.*, ed. Loveland, p. 4); and this course was recognised as legal by the Habeas Corpus Act, 1679, 31 Chas. I. c. 2, s. 13, as to felonies, but always depended on the assent of the offender. In 1717 (4 Geo. I. c. 11) transportation was made part of the sentence of the Court for sundry offences, and no longer depended on the will of the convict. It was used continuously till the successful revolt of the North American colonies, when for a time the African

coast was selected, until, in 1788, the penal settlements in Australia were established. In 1776 (16 Geo. III. c. 43) the first experiment was made of putting convicts to labour in England, by quartering them in hulks and using them to dredge the Thames.

From 1717 the convicts under sentence of transportation were in chattel servitude to the Crown, with no power of owning or acquiring property. On the refusal of the Australian colonies to accept any more transported criminals, the system of penal servitude was in 1853 (16 & 17 Vict. c. 99) substituted for that of transportation, and the latter abolished in 1857 (20 & 21 Vict. c. 3). The history of the subject has been more fully traced in 6 L. Q. R. 388.

Penal servitude may be imposed in two ways—

(1) By the sentence of the Court of trial. The term may not exceed the maximum specified by the statute creating the offence or regulating its punishment, but may be for any term not less than three years (54 & 55 Vict. c. 69, s. 1). "Penal servitude" is to be read into Acts passed before 1853 in substitution for "transportation."

(2) By the Crown, as a condition of pardon of a person sentenced to death (16 & 17 Vict. c. 99, s. 5).

The passing of a sentence of penal servitude does not, since 1870, cause any forfeiture of the property of the convict, but deprives him of any office or employment under the Crown, or any public employment, benefice or emolument under any corporation, including universities or colleges, and of any pension payable by the public or out of public money (33 & 34 Vict. c. 23, s. 2); and during the currency of his term he is deprived of all civil rights so far as concerns voting and the like, and the right to sue in any Court or to alienate any property (s. 8). His property may be vested in an administrator appointed by a Secretary of State, or an interim curator appointed by justices, who may do all that is necessary to preserve it, and is accountable to the convict (ss. 9-29). The result of this is that during the currency of his sentence the convict is a slave of the State. As to the effect of the order and the liabilities of the administrator, see *Carr v. Anderson*, [1903] 1 Ch. 90; 2 Ch. 279; *Re Gaskell and Walters' Contract*, [1906] 2 Ch. 1.

Sentences of penal servitude are now undergone in convict prisons in the United Kingdom; but the convicts may still, if desired, be sent to British possessions abroad (16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 4; and see COLONIAL PRISONER). The prisons, which have always been under the Crown, are established either under special Acts, or by royal warrant under sec. 10 of the Transportation Act, 1824, or sec. 7 of the Penal Servitude Act, 1853, and as to females, sec. 1 of 16 & 17 Vict. c. 121.

Those now in use in England are—

PLACE.	AUTHORITY.
* Broadmoor (lunatics)	Warrant, 19 Feb. 1862
* Dartmoor (males)	" 26 Sep. 1853
* Parkhurst (males)	" 7 Apr. 1869
* Portland (males)	" 26 Sep. 1853
* Aylesbury (females)	" 3 Oct. 1890

* The warrants are collected in St. R. & O., Revised (ed. 1904), vol. x., tit. "Prison."

Parkhurst is used for convicts who are in ill-health or are weak-minded, but not certifiable as insane.

These prisons are distinct from the ordinary local prisons, but can be appropriated as such if not wanted for penal servitude prisoners (47 & 48 Vict. c. 51, s. 2 (3)).

The prisons are now under the Prison Commissioners, as directors of convict prisons. The powers of the commissioners with reference to convict prisons depends on the Transportation Act, 1824; the Convict Prisons Act, 1850, 13 & 14 Vict. c. 39; and the Prison Act, 1898, 61 & 62 Vict. c. 41. See PRISONS.

Convicts may be transferred from one prison to another; and it is usual to detain them in a local prison for some time before sending them to a convict prison (10 & 11 Vict. c. 67, s. 2; 16 & 17 Vict. c. 99, ss. 7, 8).

The introduction of spirits, tobacco, and other articles into convict prisons is prohibited under penalties (11 Geo. IV. & 1 Will. IV. c. 39, s. 6; 13 & 14 Vict. c. 39, s. 4).

Convict prisons are now governed by rules made by a Secretary of State and laid before Parliament. The rules regulate the mode in which the sentences of penal servitude are to be carried out (61 & 62 Vict. c. 41, s. 2). The convicts may be flogged for certain offences in prison (27 & 28 Vict. c. 47, s. 3); but the exercise of this power is restricted by 61 & 62 Vict. c. 41, s. 5. The rules in force are those of 1889, general; 1901, dietaries; 1905, division and classification, and juvenile and adult convicts; and 1907, remission of punishments. These are published as Statutory Rules and included in Home Office circulars.

Convicts sentenced to penal servitude are for prison treatment classed in two divisions:

A. The ordinary division—

B. The long sentence division.

A. *Ordinary Division*.—All such convicts are at first put into the ordinary division and are classified as follows:—

(a) *Star Class*—*i.e.*, persons never previously convicted or not habitually criminal or of corrupt habits.

(b) *Intermediate Class*—*i.e.*, persons not previously convicted, but from general character and antecedents unsuitable for the star class, or persons previously convicted but not of such grave and persistent crime as would bring them into class (c).

(c) *Recederist Class*—*i.e.*, persons previously sentenced to penal servitude, or whose records show them guilty of grave and persistent crime, or whose licences under sentence of penal servitude have been revoked or forfeited.

Convicts in class (b) on good conduct may be promoted to class (a), or for bad conduct may be reduced to class (c).

All male convicts pass the first part of the sentence in separate confinement not exceeding three months for (a), six months for (b), or nine months for (c). The medical officer may reduce the term in view of the mental or physical condition of the prisoner. Female convicts may not suffer more than three months separate confinement. Convicts under twenty-one are also separately classified, and so far as possible separately treated.

B. *Long Sentence Division*.—This division includes selected convicts who are sentenced to terms over ten years and who have served over seven and a half years.

The division is filled by transfers from the ordinary division; and is

kept separate, and is under special rules as to association, purchase of articles of comfort or relaxation out of the proceeds of their industry, etc.

Naval and Military Prisons.—Persons under military law or naval discipline, who are sentenced to penal servitude by military or naval Courts, are detained in military or naval prisons. Naval prisons are appointed by the Admiralty. Those in use in England are Lewes and Bodmin. The prisons are governed by rules made May 1, 1900, St. R. & O., Rev. (ed. 1904), vol. ix., tit. "Navy." Military prisons are governed by the Military Prison Rules of 1899 (St. R. & O., Rev. 1904, vol. i., "Army," p. 109). The prisons are appointed by Army Orders under sec. 133 of the Army Act, 44 & 45 Vict. c. 58.

Release on Licence.—Persons sentenced to penal servitude may be released without pardon before the expiration of their sentence by a system of licences or tickets of leave (16 & 17 Vict. c. 99, s. 9). During the currency of the licence the convict is, subject to certain conditions, a free man, independent of any administrator and *curator bonis* as to his property acquired while at liberty (16 & 17 Vict. c. 99, s. 10; 33 & 34 Vict. c. 23, s. 30). If the licence is revoked, the convict may be arrested and sent to his original or another prison to complete his term (16 & 17 Vict. c. 99, s. 11; 20 & 21 Vict. c. 3, s. 5).

The conditions attached to the licence are those in Sched. A, Penal Servitude Act, 1864, 27 & 28 Vict. c. 47, as modified by the Penal Servitude Act, 1891, 54 & 55 Vict. c. 69, ss. 3, 5. Other forms may be used, but must be laid before Parliament (27 & 28 Vict. c. 47, s. 10; 54 & 55 Vict. c. 69, ss. 3, 5).

A licence holder is not now required to report himself to the police (1864, c. 47, s. 4; 1871, c. 112, s. 21), but must give notice of his residence and of any change of residence (1864, c. 47, s. 4; 1871, c. 112, ss. 5, 8; 1891, c. 69, s. 4).

If he is convicted of any offence he forfeits the licence, and is remitted to prison to undergo not only his new sentence, but after that is completed the unexpired residue of his original term (27 & 28 Vict. c. 47, s. 9; 54 & 55 Vict. c. 69, s. 3 (3); *R. v. King*, [1897] 1 Q. B. 214, 217). But a new licence may be granted in respect of the unexpired term after revocation of a prior licence (1891, c. 69, s. 3).

He may also forfeit his licence by refusing to produce it to officers of the law (1864, c. 47, s. 5); by earning his livelihood by dishonest means (1871, c. 112, s. 3); or by breach of any of the conditions of his licence, which, even if not amounting to an offence of itself, is punishable criminally (1867, c. 47, s. 5 (2); 1891, c. 112, s. 4).

Penal Statute.—A penal statute is one which imposes a pecuniary penalty or other punishment for an offence. The penalty is sometimes recoverable by the Crown, sometimes by the person aggrieved (see AGGRIEVED), and sometimes by a common informer (*i.e.* any person who chooses to sue for it). Where a statute imposed a liability in respect of false representations, and such liability was enforceable by action at the suit of the person injured, it was held that the right of action being given to a subject for the purpose of enforcing in his own interest a liability imposed for the protection of his private rights, the statute was remedial, and not penal, so as to be within the rule of international law which prohibits the Courts of one country from executing the penal laws of another country, or enforcing penalties in favour of the State (*Huntington v. Attrill*, [1893] A. C. 150).

It is a general rule of law that a penal statute ought to be construed strictly, and so as not to extend its provisions to any case which is not within both the spirit and letter of the enactment; and where general words follow an enumeration of particular cases, such general words only apply to cases *ejusdem generis* with those specified (*Fletcher v. Soudes*, 1826, 3 Bing. 501, 580; *Massey v. Morriss*, [1894] 2 Q. B. 412; *Roberts v. Woodward*, 1890, 25 Q. B. D. 412; *Chisholm v. Doulton*, 1889, 22 Q. B. D. 736; *Dyke v. Elliott*, 1872, L. R. 4 P. C. 184, 191).

The rule applies with a greater degree of force where the Act imposes a severe punishment, or affects the liberty of the subject, than where it merely imposes a pecuniary penalty (*Scott v. Morley*, 1887, 20 Q. B. D. 120; *Scott v. Pacquet*, 1867, L. R. 1 P. C. 552; *Bracy's Case*, 1703, 1 Salk. 348; *Bond v. Evans*, 1888, 21 Q. B. D. 249; *Collman v. Mills*, [1897] 1 Q. B. 396; *Brown v. Foot*, 1892, 66 L. T. 649; *A.-G. v. Siddons*, 1830, 1 Crompt. & J. 220). In *R. v. Child*, 1830, 4 Car. & P. 442, it was held that a rioter cannot be convicted of felony under the Riot Act if the words "God save the King" at the conclusion of the proclamation be omitted; in *Whiteley v. Chappell*, 1868, L. R. 4 Q. B. 147, that a person could not be convicted under the Act of 14 & 15 Vict. c. 105, s. 3, "of personating a person entitled to vote at an election" if the person personated was dead at the time; and in *Scott v. Morley*, *supra*, that a married woman is not liable to be committed to prison under sec. 5 of the Debtor's Act, 1869, for non-payment of a debt contracted by her during coverture (see also *Westhorpe v. Powley*, [1905] 1 K. B. 286). But a penal statute, like any other Act of Parliament, must be construed according to the intention of the legislature; and if the words used are precise and unambiguous, they must be expounded in their natural and ordinary sense, and must not be narrowed contrary to the spirit of the Act (*Sussex Peerage Case*, 1844, 11 Cl. & Fin. 143; *Fennell v. Ridler*, 1826, 5 Barn. & Cress. 406; *R. v. Edmundson*, 1859, 28 L. J. M. C. 213; *R. v. Hodnett*, 1786, 1 T. R. 96, 101; *Nicholson v. Fields*, 1862, 31 L. J. Ex. 233, 236; see *London C. C. v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76). "The Court is not to find any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument" (*per* James, L.J., in *Dyke v. Elliott*, 1872, L. R. 4 P. C. 184, 191). See also Maxwell's *Interpretation of Statutes*, 4th ed., pp. 394 *et seq.*; Craies on *Statute Law*, pp. 425 *et seq.*

Complaints under penal statutes, where no time is specially limited, must be made within six months from the time when the matter of complaint arose (11 & 12 Vict. c. 43, s. 11). With regard to continuing offences, the effect of this provision is that penalties may only be imposed in respect of dates within the six months preceding the complaint (*R. v. Slade*, [1895] 2 Q. B. 247; see also *Chepstow Electric Light and Power Co. v. Chepstow Gas and Coke Consumers' Co.*, [1905] 1 K. B. 198). See also PENALTY.

Penalty.—1. This term is ordinarily used for a pecuniary mulct imposed by a Court of justice for a criminal offence or for breach of a command or prohibition, express or implied, contained in a statute. It was originally quite distinct from a FINE, but is now generally used as its equivalent. The imposition of a penalty for an act or omission prohibited by statute is generally taken as the test whether the act or omission is criminal (see CRIMINAL CAUSE OR MATTER).

2. It is also used with reference to sums of money recoverable by PENAL ACTION (*q.v.*).

3. In certain forms of contract it is usual to insert a provision providing for the payment of a sum by the party breaking the contract. The stipulated sum is now usually described in the contract as "liquidated damages, and not a penalty." The Courts do not accept this description (*Ranger v. G. W. R.*, 1854, 5 H. L. C. 72), and will enquire into the real nature of the transaction to see whether the sum specified or indicated can be recovered as agreed damages, or as simply a penalty held over the defaulting party *in terrorem* (see *Clydebank Engineering, etc., Co. v. Yzquierdo*, [1905] A. C. 6, 10). The guiding rule common to the law of England and Scotland is when a single lump sum is made payable by way of compensation on the occurrence of one or more of several events, some of which may cause serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification (*Elphinstone (Ld.) v. Monkland Coal and Iron Co.*, 1886, 11 App. Cas. 332).

Where the sum leviable is extravagant, exorbitant, or unconscionable in proportion to the damage conceivably resulting from the breach, it would be treated as a penalty (*Clydebank Co. Case*, [1905] A. C. 17). Where it is a genuine fore-estimate of the creditors' probable or possible interest in the due performance of the obligation, the sum is recoverable as liquidated damages (*Public Works Commissioner v. Hills*, [1907] A. C. 369, 375; and see *Law v. Redditch L. B.*, [1892] 1 Q. B. 127, where a sum certain payable weekly for delay in completing a contract was held to be liquidated damages). Where the sum is a penalty the Courts will not permit recovery of more than the actual damage sustained (*Willson v. Love*, [1896] 1 Q. B. 626). This practice of the Courts originated from the provisions of 8 & 9 Will. III. c. 11, sec. 8 whereof, as to damages for breach of conditions in bonds, is still in force (*Davies v. Penton*, 1827, 6 Barn. & Cress. 216; 30 R. R. 298).

Where a contract between principal and agent provides for liquidated damages for breach of the contract by the agent the principal, the latter cannot obtain an injunction to restrain breach of the contract without electing to waive the claim for damages (*General Accident Ins. Corporation v. Noel*, [1902] 1 K. B. 377).

Penalty clauses are oftenest found in building contracts, and are fully treated in Hudson on *Building Contracts*, 3rd ed.; Emden on *Building Contracts*, 4th ed.; Mayne on *Damages*, 6th ed.

Penance is said to be "an ecclesiastical punishment used in the discipline of the Church which affects the body of the penitent, by which he is obliged to give a public satisfaction to the Church for the scandal he has given by his public example." It is one of the seven sacraments of the Roman Catholic Church. In primitive times offenders had to give testimony of their reformation, by doing public penance after open and public confession (see CONFESSION AND ABSOLUTION), before they were readmitted to partake of the holy mysteries; and until recent times, in cases of incest or incontinency, a public penance by the offender—barelegged and bareheaded, in a white sheet, making open confession of his offence in a set form of words in the church or the public market—was commonly enjoined on the offender; while for smaller faults and scandals, *e.g.* defamation, public satisfaction or penance

was often ordered to be made before the minister, churchwardens, or some of the parishioners.

There were three kinds of penance mentioned by the canonists—(1) Private, enjoined by the priest at private confession; (2) Public, enjoined by the priest for any notorious crime, either with or without the bishop's licence, according to the custom of the country; (3) Solemn, enjoined by a bishop only, and continuing for two, three, or more years, during Lent. As censures of penance might be moderated at the judge's discretion, according to the nature of the offence, so they might be altered by a commutation of penance; and it was the ancient privilege of the ecclesiastical judge to admit an oblation of a sum of money for pious uses in satisfaction of public penance. But penances for notorious crimes could not be commuted under the old ecclesiastical constitutions.

Great latitude and liberty was allowed to the bishops to render the discipline of penance more rigorous or easy, as they should think fit; and liberty also to shorten the term of penance in case of extraordinary zeal on part of a penitent.

By the Statute *Circumspecte agatis* (13 Edw. I. 4) the bishops were allowed to hold pleas in Courts Christian of things merely spiritual—to wit, of penances enjoined by prelates for deadly sin; and by the Statute *Articuli Cleri* (9 Edw. II. 1, 2) the enjoining of penances pecuniary for offences was prohibited, while the enjoining of penances corporal was allowed, and the money for the redeeming thereof could be demanded before a spiritual judge. The commutation money was anciently applied to the use of the Church, and its disposal was regulated by canons in the time of Elizabeth. Under Anne, Convocation abolished all commutations, unless allowed in writing by the bishop of the diocese.

The doing of penance has been ordered up to recent times in cases of gross offences, such as incest, by ecclesiastical Courts (*Blackmore v. Brider*, 1816, 2 Phillim. 359, 362; *Chick v. Ramsdale*, 1835, 1 Curt. 34; *Courtail v. Humfrey*, 1828, 2 Hag. Ec. 1, penance ordered and insisted upon; *Burgess v. Burgess*, 1804, 1 Hag. Con. 393, penance ordered but dispensed with; *Randall v. Vowles*, 1856, Phillimore, *Eccl. Law*, ii. 1070, penance not ordered, but could have been). The ecclesiastical Courts still retain this power to censure in such cases; and orders of the ecclesiastical Courts to do penance have been enforced by process for the arrest and imprisonment of the offender (*R. v. Maby*, 1823, 3 Dow. & Ry. 570; *Kington v. Hack*, 1838, 7 Ad. & E. 708). But instead of the ancient discipline against offenders, the Church of England at present contents itself with the office entitled "A Commination, or Denouncing of God's Anger and Judgments against Sinners," which is read on Ash Wednesday, after morning service.

[*Authorities*.—Burn, *Eccl. Law*; Phillimore, *Eccl. Law*, 2nd ed.; Stephens, *Laws of Clergy*; Hook's *Church Dictionary*.]

Penang.—See STRAITS SETTLEMENTS.

Pendente lite.—See ALIMONY; LIS PENDENS.

Pending.—A pending action is an action which has been commenced, and in which some further proceeding may be taken (*Sherwood v. Ray*, 1837, 1 Moo. P. C. 353; *Hart v. Hart*, 1881, 18 Ch. D. 670, 680; *Fordham v. Clagett*, 1882, 20 Ch. D. 637, 653). So long as it is possible for any proceeding to be taken in a cause, such cause is still pending

(*per* Jessel, M.R., in *Fordham v. Clagett*, *supra*, p. 653). Thus, for the purposes of sec. 24 (5) and (7) of the Judicature Act, 1873, an action is pending after final judgment so long as the judgment remains unsatisfied (*Salt v. Cooper*, 1880, 16 Ch. D. 544. See also *Howell v. Bowers*, 1835, 2 C. M. & R. 621; *Redfield v. Wickham*, 1888, 13 App. Cas. 467). But after foreclosure absolute the action is at an end, and a receiver cannot be appointed, nor any other proceeding be taken (*Wills v. Luff*, 1888, 38 Ch. D. 200).

In Sec. 18 (10) of the Patents, Designs, and Trade Marks Act, 1883, 46 & 47 Vict. c. 57, read with sec. 19, the words "action for infringement . . . pending" mean an action before judgment (*Cropper v. Smith*, 1884, 28 Ch. D. 148).

Penny Postage.—See POST OFFICE.

Pension.—This term is used in two senses—(1) Payments by members of a society in respect of dues. In this sense it is still used in Cambridge University, and it often appears in the records of the Inner Temple (see INNS OF COURT). (2) It is also, and more generally, applied to annual payments made to persons superannuated from the service of the Crown or the Church, or some other public body. At one time it was the practice of the Crown to grant freely perpetual or other pensions, charged on the permanent hereditary revenues of the Crown or the civil list; but at present no grant of a pension chargeable on public funds can be made without the authority of Parliament, and proceedings have been taken to commute and extinguish most of the perpetual pensions previously granted. The Acts in force granting such pensions to members of the royal family, or for distinguished public service, are enumerated in the Chronological Index to the statutes under the title "Annuity."

The influence obtained by the Crown in Parliament by grant of pensions led to legislation disqualifying pensioners from holding seats in the House of Commons.

In 1707 (6 Anne, c. 41, s. 24) all persons holding pensions from the Crown during pleasure were so disqualified; and in 1716 the disqualification was extended to pensions held for years (1 Geo. I. st. 2, c. 56). In 1782 (22 Geo. III. c. 82, s. 30) grants of royal bounty more than once in three years to the same person were treated as pensions. Subsequent legislation has created exceptions from the disqualification in the case of recipients of pensions in the civil or diplomatic service (32 & 33 Vict. c. 13; 32 & 33 Vict. c. 43).

The grant of pensions to Crown officials is now completely regulated by statute, of which a summary only can be given within the limits of this article.

Civil List.—In 1833 (3 & 4 Will. IV. c. 86) certain ancient pensions and similar allowances, formerly charged on the civil list, were charged on the land revenues of the Crown, to the extent of £6157 per annum.

On the accession of Queen Victoria provision was made for the grant of pensions out of the civil list by setting apart £1200 a year for that purpose (1 & 2 Vict. c. 2, s. 9), and it was provided that such pensions should be granted only to persons who have just claims on the royal beneficence, or who, by their personal services to the Crown, by the performance of duties to the public, or by useful discoveries in science and attainments in literature and the arts, have merited the consideration

of the Sovereign and the gratitude of the country. By the Consolidated Fund Act, 1838, 1 & 2 Vict. c. 95, s. 1, the Sovereign is authorised to charge £136,000 a year on the Consolidated Fund in payment of certain pensions charged on the civil list by 2 & 3 Will. iv. c. 116.

On the accession of King Edward VII. pensions were dealt with by the Civil List Act, 1901, 1 Edw. VII. c. 4. By sec. 9 (1) of the Act civil list pensions continue under the same conditions as before. A list of pensions granted in any year (ending 31st March) is laid before Parliament annually by the Treasury (see *Parliamentary Paper* 206, sess. 1907). Pensions exceeding £200 are seldom given. Not an uncommon form of bounty is to grant small pensions to the widows and daughters of eminent men who have left them in straitened circumstances.

Political Services.—The Political Offices Pension Act, 1869, 32 & 33 Vict. c. 60, provides for the grant of pensions to certain persons who have held offices in the civil service, usually held by members of the House of Lords or the House of Commons; but does not apply to offices in the permanent civil service, nor to the chancellor or law officers, but did apply to the judge advocate-general (s. 1); but this official is now regarded as a member of the permanent civil service. See JUDGE-ADVOCATE GENERAL herein, and *Manual of Military Law*, 1907 ed., p. 160.

Pensions granted under the Act are payable out of the Consolidated Fund, except in the case of offices the salary of which is paid out of Indian revenues; in which case the pension falls on that revenue (ss. 5, 8). The pensions are payable on the following scale:—

OFFICES.	SCALE.
First Lord of Admiralty or offices of salary not under £5000 a year.	Not exceeding £2000 a year, in respect of a service of not less than four years.
Offices at a salary less than £5000, and not under £2500.	Not exceeding £1200, in respect of a service of not less than six years.
Offices at a salary of less than £2000, and over £1000.	Not exceeding £800, in respect of a service not under ten years.

The service need not be continuous, and provision is made for counting up service in lower classes as a qualification for pensions in a higher class.

When an applicant for a pension receives any salary or pension paid out of public revenue, he must so inform the Treasury, and must surrender the prior salary or pension if it exceeds the political pension, or deduct its amount if it does not exceed it. He must also file a declaration, stating the grounds on which the pension is claimed, and that his income from other sources is so limited as to bring him within the Act (Superannuation Act, 1834, c. 24, s. 6; Political Pensions, 1869, c. 60, s. 7). The declaration in question is to the effect that the applicant's private fortune is inadequate to maintain his station in life (*Hansard's Parl. Debs.*, 4th ser., vol. clxxiii. c. 1362). Holders of these pensions are not disqualified from sitting in Parliament, though their pensions are not payable while they are holding salaried office.

Diplomatic Service.—The pensions of persons in the diplomatic service are regulated under 32 & 33 Vict. c. 43, which applies to diplomatic offices only, and not to ordinary consuls with commercial functions only.

Colonial Service.—The pensions of colonial governors are regulated by Acts of 1865 (28 & 29 Vict. c. 113) and 1872 (35 & 36 Vict. c. 29), in accordance with scales scheduled to the latter Act, and subject to

provisions of 1889 (50 & 51 Vict. c. 13), for determining how far the service of the pensioner is imperial civil service or colonial service only; and colonial governors fall to some extent within the provisions of the Acts relating to Permanent Home Civil Service (below), but they cannot get concurrent pensions as governors and as permanent civil servants.

Civil Service.—The pensions and superannuation allowances in the permanent civil service are mainly regulated by the Superannuation Acts of 1834 (4 & 5 Will. IV. c. 24) and 1859 (22 Vict. c. 26). The persons entitled to these pensions are—

- (1) Persons holding office directly from the Crown.
- (2) Persons admitted to the service on certificate from the Civil Service Commissioners (1859, c. 26, s. 17; 1887, c. 57, s. 2).
- (3) Persons serving jointly in the India Office and the Home Civil Service (1860, c. 89).
- (4) Workmen in the manufacturing and store departments of the War Office, who entered the service between December 17, 1861, and June 4, 1870 (1890, c. 18).
- (5) Persons employed in any imperial civil capacity in a colony, and also in the Permanent Colonial Civil Service, in proportion to the extent of their imperial service (1887, c. 13).

The scales of allowance are regulated by the Acts of 1834 and 1859, subject to a power to add on years to service to count for pension in case of professional and other special offices, and to give special rates for services in unhealthy places.

No pension is payable on retirement under sixty, except on a medical certificate of permanent infirmity or incapacity of mind or body (1859, c. 26, ss. 10, 11), and after independent inquiry by the Treasury (under a minute of December 10, 1892). The pension may be increased for special merit, or cut down for demerit (1859, c. 26, s. 9).

The Acts and rules on this subject are collected in Highmore's *Inland Revenue Regulation Acts*, 1896.

Persons who are in receipt of non-effective pay, if they are put into a civil office of profit under any public department, or under a colonial or foreign Government, are subject to rules made by the Treasury in 1887, framed to secure a reduction of the non-effective pay while the new employment continues. The rules do not extend to pensions for wounds or rewards for distinguished or meritorious service (see Highmore, p. 173).

Pensions may be commuted wholly or in part under Acts of 1871 (34 & 35 Vict. c. 36) and 1882 (45 & 46 Vict. c. 44), when granted (1) to officers in the army or navy, (2) when granted to civil servants on abolition or reorganisation of their offices. The Treasury minutes under these Acts are printed in Highmore.

The pensions granted by the Crown are subject to income tax, but to no other tax (1859, c. 22, s. 16).

Naval and Military Service.—See GREENWICH HOSPITAL; PAY AND PENSIONS (MILITARY AND NAVAL).

Judicial Service.—As to the pensions of judges, see SUPREME COURT. The Masters and subordinate officials of that Court for purposes of pension are civil servants. As to County Court judges and officers, see COUNTY COURTS.

London police magistrates may obtain pensions (see METROPOLITAN POLICE DISTRICT).

Municipal Service.—There is in the Public Health Act, 1875, 38 & 39 Vict. c. 55, no power to provide payment of superannuation allowances, though there is power by sec. 309 (which prescribes a scale of allowances) for the payment of compensation to officers in certain cases for loss of office due to abolition by law or re-arrangement of areas.

Statutory provision is made for pensions to the police, paid partly out of imperial taxation and partly by the police rate (see POLICE).

Poor law officers receive superannuation allowances under the Poor Law Officers Superannuation Acts, 1864, 27 & 28 Vict. c. 42; 1896, 59 & 60 Vict. c. 50; 1897, 60 & 61 Vict. c. 28, and though receiving pensions may still retain office as registrar of marriages (39 & 40 Vict. c. 61, s. 17). As to the effect of superannuation schemes established without statutory authority by local authorities, see *Phillips v. London School Board*, [1898] 2 Q. B. 447.

Officers and servants employed in and about any baths, washhouses, open bathing places, or covered swimming baths established under the Baths and Washhouses Act, 1878, 41 Vict. c. 14, may be superannuated under the Superannuation (Metropolis) Act, 1866, 29 Vict. c. 31, ss. 1, 3, 4.

Officers and servants of the Metropolitan Water Board are also able to be pensioned under the provisions of the Superannuation (Metropolis) Act, 1866 (Metropolitan Water Act, 1902, 2 Edw. VII. c. 41, s. 24 (4)).

Many public pension and superannuation schemes exist by virtue of local Acts, but, as pointed out above, there is not at present any general statutory scheme embracing all municipal service.

Officers who make payments to a thrift fund established under a local corporation Act are not entitled to deduct such payments for the purposes of income tax assessment (*Hudson v. Gribble*, [1903] 1 K. B. 517), but otherwise in the case of payments under the Poor Law Superannuation Act, 1896 (*Baumont v. Bowers*, [1900] 2 Q. B. 204).

Ecclesiastical Pensions.—Bishops, deans, canons, or incumbents may be pensioned if incapacitated by age or infirmity from the discharge of their ecclesiastical duties. The pension is paid from the revenues of the See, office, or cure vacated.

Whether a pension is alienable or not depends on the particular Acts and regulations under which it is granted; but a pension, even if inalienable, vests in the trustee in bankruptcy (*Ex parte Huggins*, 1883, 21 Ch. D. 85), and may be dealt with under sec. 53 of the Bankruptcy Act, 1883 (*In re Saunders*, [1895] 2 Q. B. 424).

When not alienable, they cannot be taken in execution (*Lucas v. Harris*, 1886, 18 Q. B. D. 127), unless commuted (*Crowe v. Price*, 1888, 22 Q. B. D. 429). It is immaterial whether the execution is legal or equitable.

Pensioner.—See GREENWICH HOSPITAL; PENSION; PAY AND PENSIONS.

Pension (Ecclesiastical).—Pensions in the ancient sense are sums of money paid to clergymen in lieu of tithes; and some churches have settled on them annuities or pensions payable by other churches. These pensions are due by virtue of some decree made by an ecclesiastical judge upon a controversy for tithes, by which the tithes have been decreed to be enjoyed by one and a pension thereout paid to another; or they have arisen by virtue of a deed made by the consent of the parson, patron, and ordinary.

By the Statute 26 Hen. VIII. c. 3, s. 21, it was provided that they who pay pensions to others out of their spiritual living might retain the tenth part thereof, and by sec. 22 no pension was to be reserved upon the resignation of a benefice above the value of the third part. By 13 Eliz. c. 20, s. 1, the grant of any new pension was made void.

Retiring pensions may be granted to bishops resigning under the Bishops Resignation Act, 1869, 32 & 33 Vict. c. 111; to deans and canons resigning under the Deans and Canons Resignation Act, 1872, 35 & 36 Vict. c. 8; and to incumbents resigning according to the provisions of the Incumbents Resignation Acts, 1871 and 1887, 34 & 35 Vict. c. 44; 50 & 51 Vict. c. 23.

See Phillimore's *Eccles. Law*, 2nd ed., pp. 1238-41.

Pensions of the Inns of Court.—See BAR, Vol. II., at p. 307.

Pentecostals.—Pious oblations made at the feast of Pentecost or Whitsuntide by parishioners to their priest, and sometimes by inferior churches or parishes to the principal mother-church. These oblations were also called Whitsun-farthings, and were divided into four parts: one to the parish priest, a second to the poor, a third for repair of the church, and a fourth to the bishop. See under "Pentecostalia," in Glossary to Kennett's *Parochial Antiquities*.

Pentonville.—Pentonville Penitentiary was a prison in the Clerkenwell district of London used as a place of confinement for male convicts under sentence of penal servitude. The Housing of the Working Classes Act, 1885, 48 & 49 Vict. c. 72, however, by sec. 3 empowered the Crown authorities, in the event of its being found convenient to remove it, to convey the site to the Metropolitan Board of Works at a fair market price, and it has since been demolished, part of the site being now occupied by the parcels department of the General Post Office. It used to be under the supervision of the Directors of Convict Prisons, by whom its governor, chaplain, and other officials were appointed. The chief Acts regulating it were the 5 & 6 Vict. (1842) c. 29; 13 & 14 Vict. (1850) c. 39; 16 & 17 Vict. (1853) c. 99, s. 6; and 20 & 21 Vict. (1859) c. 3, s. 3.

Peoples.—See RULERS, PRINCES, AND PEOPLES.

Pepper-corn.—A nominal rent, as its name implies, reserved where the land is to be held practically rent free, yet the landlord wishes, if necessary, by demanding the pepper-corn to have the tenancy at any time acknowledged by the tenant. The reddendum in the lease for a year that preceded the release generally reserved a pepper-corn as rent. In modern times building leases sometimes reserve a pepper-corn as rent for the first few years.

The production of a receipt for a pepper-corn does not relieve a vendor of a lease from proving that covenants in the lease have been complied with. The rendering of a pepper-corn is not a payment of rent contemplated by sec. 3, subs. 4 of the Conveyancing Act, 1881 (*In re Moody and Yates' Contract*, 1885, 30 Ch. D. 344).

Perambulation.—Perambulation—that is, "a walking of boundaries"—has for its main object the prevention of encroachment

on lands, and the acquisition of prescriptive rights thereover, by persons not entitled. Thus in Rogation week of each year the minister, churchwardens, and parishioners were accustomed (or supposed) to go round their parishes (see under PARISH BOUNDARIES); and it was held that in so going they were entitled to cross any man's land according to usage, and even abate nuisances (*Goodday v. Michell*, 1594, Cro. Eliz. 441; 78 E. R. 681). Manors may also be perambulated. So a writ *Perambulatione faciendâ* is available where two lordships lie near each other, and encroachments are alleged to have been made. This writ directs the sheriff to make due perambulation, and set down the certain limits of the respective lordships, so that the true bounds thereof may be severally known. A lord of the manor (it would seem) may even establish by perambulation rights against the Crown as to the seashore, which is in the Crown by common right: see under FORESHORE.

Per and Post.—To claim *per* is to claim through the person last entitled to the estate claimed; this being the usual claim, viz., by devolution or assignment. The technical expression is "to come in in the *per*." On the other hand, "to come in in the *post*" is to claim by an overriding and prior title to that of the person last entitled to the estate, e.g. in the case of escheat.

In the case of the old writ of entry, the Statute of Marlbridge, 52 Hen. III. c. 30, gave the disseisee or his heir a writ of entry "*sur disseisin* in the *post*," that is to say, he might allege that his adversary had no right of entry in the land save after (*post*) the disseisin that some person or other had perpetrated against the demandant; and it was unnecessary for the demandant to trace the degrees by which the land passed from the person who had originally disseised to the party in possession, against whom the writ was brought. Previously thereto the writ could only be brought against the original intruder or his descendant or feoffee, but no further. This "degree" of descent was called the *per*, and the writ alleged "*non habuit ingressum nisi per X.*" (the original disseisor).

"The first stage is 'into which he had no entry save by (*per*) X., who demised it to him, and who had disseised the demandant or his ancestor.' The second stage is 'into which, etc., save by (*per*) X. to whom (*cui*) Y. demised it, who had disseised, etc.' The first form is a writ in the *per*; the second, in the *per* and *cui*" (Pollock and Maitland's *History of English Law*, ii. 65). The writ in the *post* was meant to extend to cases of more than two degrees (i.e. where there had been more than two alienations or descents), beyond which no writ of entry lay at common law; and subsequently to its introduction by the statute, the writ in such cases was "*non habuit ingressum nisi post intrusionem quam fecit;*" the third stage, therefore, being "into which he had no entry save after (*post*) X., who had disseised, etc." See Pollock and Maitland, *History of English Law*, loc. cit.

Per capita; Per stirpes.—Where distribution is to be *per capita*, the members of the class take the property to be distributed in equal shares, the individual alone being considered in the distribution. In distribution *per stirpes*, the stock or family is considered, and children do not take concurrently with their parents.

The question arises frequently, in construing gifts to children in wills, whether the fund given is to be distributed *per capita* or *per stirpes*.

In default of an intention expressed in or to be inferred from the will, the following statement of Lord Romilly is useful:—

“The cases of *Barnes v. Patch*, 1803, 8 Ves. 604; 32 E. R. 490; 7 R. R. 127; *Lady Lincoln v. Pelham*, 1804, 10 Ves. 166; 32 E. R. 808; 7 R. R. 370, and *Rickabe v. Garwood*, 1845, 8 Beav. 579; 50 E. R. 228; 68 R. R. 207, decide that a fund is to be distributed *per capita* and not *per stirpes* when it is directed to be paid on a particular event in such cases as the following, namely, where a fund is to be divided between the families of my brother L. and my sister E., where one-fourth of a residue is to be paid to the younger children of N. and one other fourth part to or among the younger children of S., where a legacy is to be paid between or amongst the children of P. and the children of R. In all these instances the Court has determined that the distribution is *per capita* and not *per stirpes*” (Romilly, M.R., in *Abrey v. Newman*, 1852, 16 Beav. 431, at p. 433; 51 E. R. 845). Again if the gift is to “my son A. and the children of my son B.” A. only takes an equal share with each of the children of B. (*Blackler v. Webb*, 1726, 2 P. W. 383; 24 E. R. 777; *Payne v. Webb*, 1874, 19 Eq. 26). In a gift to issue simply they will take *per capita* (*Davenport v. Hanbury*, 1796, 3 Ves. 257). And notwithstanding that a slight indication of intention is said to be sufficient to import a distribution *per stirpes*, the plain words of a will will be allowed their full effect (see *Re Stone*, quoted *infra*).

In the following cases a stirpital distribution has been directed:—

(1) Where the annual income of the fund is, pending distribution, to be applied to the legatees *per stirpes* (*Brett v. Horton*, 1841, 4 Beav. 239; 49 E. R. 331; 55 R. R. 64).

(2) Where there is gift over to other legatees *per stirpes*.

(3) Where the gift to children is substitutional, e.g. to A., B., and C., or their children, the children take *per stirpes* (*Congreve v. Palmer*, 1853, 16 Beav. 435; 51 E. R. 846; *Re Sibley's Trusts*, 1877, 5 Ch. D. 494).

(4) Directions importing a distribution *per stirpes*, e.g. a direction that such “issue shall take their respective parents’ shares, excludes the idea of the issue competing with the original takers under the gift” (*Johnson v. Cope*, 1853, 17 Beav. 561). So likewise the use of the word *parent* where it is provided that the issue shall take the parent’s share, is held to mean the parent of each successive generation, and the word is said to be used in “a recurring or sliding scale.”

(5) Where there is a gift to several for life, and then to their children, and the life tenants are tenants in common, “after the death” means, naturally and primarily, after the death of each, and consequently “to their children” means “to their respective children,” and the children take *per stirpes* (cp. *In re Hutchinson*, 1882, 21 Ch. D. 811); but *per capita inter se* (*vide supra*). The stirpital distribution was held to be the result where the income of houses was directed to be divided between a son and daughter during their lives and after the death of either leaving issue to be divided into moieties, one to go to the children of the son or daughter so dying (*Re Campbell's Trusts*, 1886, 33 Ch. D. 98). Refined distinctions are seized upon to produce the same result as in the case of a gift to grandchildren, the children of a son and daughter with a gift over of the share of any grandchild who should not live to attain a vested interest to his brothers and sisters and not to the members of the larger class, the grandchildren.

Where the gift after the death of tenants for life is to the children

of some only of the tenants for life, the children take *per capita*; and where it is clear that the distribution is not to take place till the death of the last surviving tenant for life, the children likewise take *per capita* (see Theobald and Jarman, *loc. cit.*).

If after a life estate there is a gift to children then surviving and their issue, the children and issue take *per capita* (*Re Fox's Will*, 1865, 35 Beav. 163; 55 E. R. 857). Where there is a gift to several for life in succession, and at their death a gift of their shares to their children, it will pass the share of each tenant for life to his children *per capita* (*Waldron v. Boulter*, 1856, 22 Beav. 284; 52 E. R. 1117; *Turner v. Whittaker*, 1856, 23 Beav. 196; 53 E. R. 77).

But although the fact that the annual income, pending distribution, is applied *per stirpes* may point to an indication of intention that the corpus, when distributable, shall be distributed *per stirpes*, if the ultimate words are clearly in favour of a distribution *per capita* the Court will not decide for a division *per stirpes*. And where a testator gave real and personal estate to his wife for her life, and directed that after her death the income should be divided between his brothers and sisters therein named, "at the decease of either my before-named brothers or sisters, their interest to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be called in and to be equally divided between the children of the aforesaid, share and share alike," it was held by the Court of Appeal that the ultimate gift to the nephews and nieces was a clear gift *per capita*, and could not be controlled by the fact that so long as any brother or sister of the testator was living the income was divisible *per stirpes* (*In re Stone*, [1895] 2 Ch. 196, reversing the decision of the Court below, following *Brett v. Horton*, 4 Beav. 239; 49 E. R. 331; 55 R. R. 64, and the older cases).

See Theobald on *Wills*, 6th ed., 1905 pp. 294, *et seq.*; Jarman on *Wills*, ii., 4th ed., 194 *et seq.*

Percaptura.—A place in a river made up with banks, etc., for the better preserving and taking of fish (*Paroch. Antiq.* 120).

Percentage.—The number one hundred has been found in practice for many purposes a useful standard upon which to calculate rates of interest and other similar payments. For instance, the stamp duty on bills of exchange and money drafts is, for sums of £100 and upwards, one shilling per hundred pounds or fraction thereof. So under the Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, Sched. 2, the person making a distress for rent under the Act, that is to say, the bailiff, and not the landlord (*Philipps v. Rees*, 1889, 24 Q. B. D. 17, overruling *Coode v. Johns*, 1886, 17 Q. B. D. 714), is entitled to a "percentage." So also the schedule to the order as to Supreme Court Fees, 1884, item 72, gives a percentage by way of Court fees. Under this order it was held that the Court fees on a trustee's periodical accounts should be proportionate to the amounts found from time to time to have been received, and not to the amounts due (*In re Crawshay, Dennis v. Crawshay*, 1888, 39 Ch. D. 552); and under the Rules of Court, 1875 (Court Fees), it was also held that the percentage for Court fees was payable on the gross receipts in accounts ordered to be taken (*Armitage v. Elworthy*, 1879, 13 Ch. D. 91). As to the percentage chargeable by solicitors on purchase-money under the Solicitors'

Remuneration Act, 1881, 44 & 45 Vict. c. 44, see *In re Lacey & Son*, 1883, 25 Ch. D. 301. Where a manager of ironworks verbally agreed to be remunerated by seven and a half per cent. of the profits on condition that the percentage paid in any year should never be less than £500, and for several years received £500, though entitled to more, it was nevertheless held that, in the absence of fraud, he could only recover the overbalances without interest (*Rishton v. Grissell*, 1870, L. R. 10 Eq. 393).

Per Cwt.—In contracts this phrase will receive its ordinary and natural signification. Sometimes it may be implied though not expressed. Thus in one case parol evidence was admitted to show that in the hop trade a contract for the sale of a stated number of pockets of hops at so many shillings referred to the price “per hundredweight” (*Spicer v. Cooper*, 1841, 10 L. J. Q. B. 241).

Peremptory.—Any statement or declaration is peremptory (from Latin, *perimo*, I cut off) which is meant to be final and determinate, and is therefore couched in absolute or positive language. There is no hope of further amendment or indulgence. Eight classes of peremptory matters will be noted here, namely: (1) challenge; (2) day; (3) mandamus: order; (4) paper; (5) plea; (6) rule; (7) undertaking; and (8) writ.

1. *Peremptory Challenge.*—See JURY.

2. *Peremptory Day.*—By the rules of Court a precise time is in many cases fixed for papers to be lodged or business to be done. Thus if a statement of claim is not delivered in time, a defendant may apply to dismiss the action for want of prosecution (R. S. C., Order 27, r. 1). And every judgment or order to do any act must state the time within which it is to be done, and have endorsed on it a memorandum of the penalty for disobedience to it (Order 41, r. 5). At the same time the Court can always make orders enlarging a time fixed for the doing of an act, when the question is one of procedure (*Carter v. Stubbs*, 1880, 6 Q. B. D. 116; *Pilcher v. Hinds*, 1879, 11 Ch. D. 905), though not apparently when the time is fixed by statute (*In re Oliver & Scott's Arbitration*, 1889, 43 Ch. D. 310; *Flower v. Bright*, 1862, 2 John. & H. 590; 70 E. R. 1194). See TIME, *Extension of*.

3. *Peremptory Mandamus: Order.*—See MANDAMUS: ORDERS.

4. *Peremptory Paper.*—The rules of Court provide for the publication of papers containing lists of the causes to be tried, which in the Chancery Division is one of the duties of the registrars (R. S. C., Order 62, r. 17). On the peremptory paper are placed such motions and other matters as are to be disposed of before any other business. At the hearing, motions may be adjourned on such terms as the Court or judge thinks fit (Order 52, r. 7); and should notice thereof be withdrawn, or the parties moving not appear, the respondent will be entitled to his costs (*Ballard v. Halliwell*, 1896, 65 L. J. Q. B. 332; *Harrison v. Leutner*, 1881, 16 Ch. D. 559; *Berry v. Exchange Trading Co.*, 1875, 1 Q. B. D. 77).

5. *Peremptory Plea.*—Pleas or defences to actions were formerly divided into dilatory pleas and peremptory pleas; the former being

those which did not affect the cause of action itself, but merely stopped the particular action, while the latter defeated the plaintiff's claim altogether, wherefore they were styled pleas in bar or peremptory pleas. See BAR, PLEA IN.

6. *Peremptory Rule*.—In practice, previously to the Common Law Procedure Act, 1852, a defendant might obtain a peremptory rule to declare within a certain time, that is, a rule made absolute in the first instance. The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 53, abolished this practice and substituted a four-day notice, requiring the opposite party to declare, or, in default, have judgment *non pros*. entered against him. Now, under the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 100, the word "order" shall include rule (cp. *Walsall Overseers v. L. & N.-W. Rly. Co.* 1878, 4 App. Cas. 30; *R. v. Justices of Galway*, [1906] 2 Ir. R. 446); and in default of delivery of a statement of claim, the defendant may apply to have the action dismissed for want of prosecution, though, on the hearing of such application, the judge will usually give directions in the form of a peremptory order to plead within a time fixed, or, in default, have the action dismissed without further notice (Order 27, r. 1; and see *supra*, *Peremptory Day*). Whether such an order is final or interlocutory depends upon the facts of each particular case, and the test for determining the question ought to be, "Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not it is then, in my opinion, an interlocutory order," *per* Lord Alverstone, C.J., in *Bozson v. Altrincham Urban Council*, [1903] 1 K. B., at p. 548. In this case the Court overruled *Salaman v. Warner*, [1891] 1 Q. B. 734, and preferred *Sherbrook v. Tufnell*, 1882, 9 Q. B. D. 621, a Court of Appeal decision which was not cited in *Salaman v. Warner*. See also *In re Riddell, Ex parte Strathmore*, 1888, 20 Q. B. D. 513, dealing with the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 4 (1). If the decision is on an interlocutory matter it may be appealed against by a four-days' notice (Order 58, r. 3). See NON PROS.

7. *Peremptory Undertaking*.—The Court might formerly, and can now in some cases, set aside a judgment for want of prosecution upon payment of costs, and a peremptory undertaking to try at the next sittings of assizes, especially if the plaintiff had been delayed on account of his witnesses or the like (cp. R. S. C., Order 27, r. 15). Generally speaking, however, a formal order will be drawn up (*In re Hull and County Bank*, 1879, 13 Ch. D. 261), disobedience to which, except it be for the payment of money, will be enforced by attachment or by committal (Order 42, r. 7). When an undertaking is given to the Court it is equivalent to an injunction, and its breach may be punished in the same way (*Neath Canal Co. v. Ynisarwed Colliery Co.*, 1875, L. R. 10 Ch. 450; *London and Birmingham Rly. Co. v. Grand Junction Canal*, 1835, 1 Rly. Ca. 224). So an undertaking to pull down buildings may be enforced (*Smith v. Day*, 1882, 21 Ch. D. 421), as also one not to appeal (*King v. Ashwin*, 1884, 28 Sol. J. 376; *Jones v. Victoria Graving Dock Co.*, 1877, 2 Q. B. D. 314); and a defendant may be committed for breach of an undertaking given by his counsel and signed by his solicitor although he professes himself ignorant of it (*Callow v. Young*, 1886, 55 L. T. 543); and if a plaintiff obtains an injunction by an

undertaking to amend his writ, and he fails to do so, the injunction may be dissolved (*Spanish Agency Corporation v. Spanish Corporation*, 1890, 63 L. T. 161).

8. *Peremptory Writ*.—This was a form of original writ occasionally in use when nothing was specifically demanded, but only a satisfaction in general. For instance, a writ of this form might be issued to a sheriff, directing him to cause the defendant to appear in Court without any option given him, provided the plaintiff gave the sheriff security effectually to prosecute the claim. Such a writ was called from its words a *si te fecerit securum*. Among peremptory writs were writs of trespass on the case, wherein no debt or other specific thing was claimed, but only damages to be assessed by a jury.

Performance.—The equitable doctrine of performance is the best illustration of the maxim, “equity presumes an intention to fulfil an obligation.” It is with “performance” in this sense only that this article deals.

Where a person covenants to do an act, and subsequently does that which may rightly be considered a performance or partial performance of the covenant, equity treats it as such, and discharges the covenantor and his estate *pro tanto* from his obligation. In performance, equity presumes the doing of the very thing in respect of which the obligation exists; in the case of “satisfaction,” the thing done is something different, yet none the less the substitution for that in respect of which the obligation exists. See MAXIMS OF EQUITY; SATISFACTION.

The leading cases on the doctrine of performance are *Lechmere v. Lechmere*, 1735, Ca. t. Talb.; 25 E. R. 673 (performance of a covenant to purchase and settle land), and *Blandy v. Widmore*, 1716, 1 P. Wms. 323; 24 E. R. 408; 2 Vern. 709; 23 E. R. 1066 (performance of a covenant to leave money). And it is from these two cases that the chief principles that govern the doctrine may be deduced. See the cases in White and Tudor's *Leading Cases in Equity*, vol. ii., 7th ed., pp. 399 and 407 respectively, and notes thereto.

The application of the doctrine is not necessarily excluded by the fact that there are some differences in the respective ways in which the act in question is covenanted to be done and that in which it is “performed.” And of this principle the leading case of *Lechmere v. Lechmere* affords a good illustration. There the covenantor on his marriage covenanted to lay out £30,000 within one year after his marriage in the purchase of freehold lands in fee simple in possession, with the consent of the trustees, the lands when purchased to be settled on himself for life, and after his death upon certain trusts, with an ultimate remainder to himself, his heirs and assigns for ever. At his death the covenantor was possessed of realty which, for convenience, may be thus classified—(1) Lands of which he was seised before his marriage; (2) estates for lives and reversionary interests purchased after his marriage; (3) freehold lands in fee simple in possession purchased after his marriage, but not purchased within a year, or with the consent of the trustees. It was held that the money which the covenantor had agreed to lay out in lands ought to be taken as land, and go to the heir; and the question thereupon arose as to whether the lands that descended to the heir were to be considered as a performance of the covenant. It was clear that the first class above noticed could not have been so intended, nor could

the second, the property in question being of a totally different nature from that of the property in the covenant. The third class, however, in spite of the inconsistency as to the time limit of one year, and the consent of the trustees, was held to have been purchased with the intention of performing the covenant, and the descent of such lands to the heir was held to be a performance of the covenant. The fact that the value of the lands thus descending was very far short of £30,000 did not exclude the application of the doctrine, Lord Talbot stating the principle thus: "It is not an objection to say that they are of unequal value; for a covenant may be executed in part, though it is not so in satisfaction."

Permission merely as well as actual commission may result in performance, *e.g.* a covenant to settle on an eldest son an estate of the annual value of £100 is performed by the death intestate of the covenantor, and the devolution on the son (as heir) of an estate of that value (*Wilcox v. Wilcox*, 1706, 2 Vern.; 23 E. R. 961).

Covenants to Purchase and Settle Land.—From the above cases, as regards the doctrine of performance as it affects covenants to purchase and settle lands, the following points may be deduced:—

1. A difference in the *time* at which the title to the lands is acquired is material, and will exclude the application of the doctrine, for if a man covenants to purchase in the future it is not reasonable to assume that he intends to bind property of which he is possessed at the time of covenanting. [But where the covenantor has at the date of the covenant contracted to purchase other lands, it may be that those lands are bound (*Warde v. Ward*, 1852, 16 Beav. 103; 51 E. R. 716).]

2. A difference in the nature of the property purchased is likewise material, and excludes the doctrine. Accordingly, the more general the description of the property in the covenant the greater the likelihood of purchased property being held to have been purchased in performance of the covenant, *e.g.* though, as in the leading case, a purchase of estates for lives and reversions cannot reasonably be held to have been made in performance of a covenant to purchase freeholds in possession in fee simple, nor again a purchase of leaseholds or copyholds in performance of a covenant to purchase "freeholds," yet where the covenant is to purchase "lands" simply, a purchase of copyholds has been held to be a performance. The question in each case is what is the intention of the purchasing covenantor to be reasonably presumed (*cp. Pinnell v. Hallett*, 1851, Amb. 106; 27 E. R. 67).

3. A difference as to the exact method in which the property is purchased (*e.g.* without the trustee's consent) is immaterial, for when the covenantor makes the purchase, it is but reasonable to presume that he does so, not voluntarily, but in discharge of his obligation (*Lechmere v. Carlisle*, 1735, Ca. t. Talb. 80; 25 E. R. 673; *Lechmere v. Lechmere*, *supra*). And *Sowden v. Sowden*, 1785, 1 Bro. C. C. 582; 28 E. R. 1311; 1 Cox, 165; 29 E. R. 1111, is an even stronger instance: the husband on marriage covenanted to pay the trustees not less than £2000, to be laid out by them in lands in a certain county, and never paid the money to the trustees, but soon after the marriage purchased lands in that county, taking a conveyance of them to himself in fee. He then died without making any settlement, and intestate, and it was held that the lands were to be deemed purchased in performance of the covenant, and to be liable to the trusts of the settlement. "If a man covenants to purchase land *modo et forma*, and if he do purchase at all, whether *modo et forma* or otherwise, it shall be the same thing."

4. A difference in the respective values of the lands is immaterial, the purchase in such a case being a performance *pro tanto* of the covenant.

5. The money need not be laid out altogether upon one purchase; purchases made from time to time will satisfy, and therefore be a performance of, the covenant.

A covenant to purchase lands, as a consequence of the doctrine of performance, binds in equity the lands which are deemed to have been bought in performance of the covenant even in the hands of the heir, since "a man can be no contractor with his heir or executor, for they all derive under his will or permission." But the covenant does not create any lien or charge on the covenantor's property so as to affect a purchaser or mortgagee, "who is a purchaser *pro tanto*." For if the covenantor sells the lands, this is a sufficient evidence of his intention that he did not mean to act in pursuance of his covenant (*per* Lord Hardwicke in *Deacon v. Smith*, 1746, 3 Atk. 323; 26 E. R. 988; *Mornington v. Keane*, 1858, 2 De G. & J. 292; 44 E. R. 1001, and see cases there cited); [but not if he mortgages the lands (*Ex parte Poole*, 1847, 17 L. J. Bank. 12)].

Covenants to Leave Money.—By analogy to the doctrine above noticed on covenants to purchase and settle land, and more especially by analogy to the decision in *Wilcox v. Wilcox*, it was decided in *Blandy v. Widmore* (*loc. cit.*) that a covenant to leave a sum of money is performed by the covenantor dying intestate, and allowing thereby an equal sum to devolve on the intended donee (*Thacker v. Key*, 1869, L. R. 8 Eq. 408). In the leading case the covenantor covenanted to leave his intended wife £620, and that his executors should pay her that sum within three months after his death; he died intestate without issue, and his wife thereupon becoming entitled to half his estate under the Statute of Distributions, it was held that her distributive share far in excess of the £620 was a performance of the covenant. And if the distributive share is less than the sum in the covenant it is a part performance (*Gartshore v. Charlie*, 1804, 10 Ves. 1; 32 E. R. 743; 7 R. R. 311). A covenant that the executors of the covenantor shall pay is the same as a covenant to "leave." And it is immaterial whether the subsequent benefit accrues by actual or virtual intestacy, *e.g.* failure of a bequest or bequests. Accordingly, where a husband covenants to leave his wife £3000, and by his will gives his property to certain executors on trust to divide it as they shall think right, and all the executors predecease him or renounce, and the property is accordingly divisible under the Statute of Distributions, the wife's share is likewise a performance of the covenant (*cp. Goldsmid v. Goldsmid*, 1818, 1 Swans. 211; 36 E. R. 361; 18 R. R. 60). But to the application of this rule there are certain exceptions; the exceptions are, however, clearly distinguishable from the rule. The true rule is stated in *Gartshore v. Charlie*, 1804, 10 Ves. 1; 32 E. R. 743; 7 R. R. 311, viz., a covenant by a husband to leave or pay at his death, or that his executors shall pay at his death to a person who, independently of that engagement by the relationship between them will take a provision, is to be construed with reference to that, and the slight difference between leaving and paying, or whether within three or six months, or the executor's year, is not attended to. Clearly in such cases as this the party recovers by the intestacy all that could have been recovered by an action on the covenant. There is no breach of the covenant, for it is not enforceable till the husband's death.

Accordingly the principle of the rule is not applicable to distinguishable cases, such as—

1. Where a testator by will gives a sum of money payable under different circumstances from those attaching upon the sum under the covenant—for the legacy *prima facie* imports “a bounty and an intention of kindness absent in the case of intestacy.”

2. Where the covenant is enforceable before the husband's death, *e.g.* where, as in *Oliver v. Brickland*, 3 Atk. 420; 26 E. R. 1042, the husband covenants to pay a sum within two years after marriage, and dies after that period and intestate, the widow's distributive share is held not to be a performance of the covenant.

See on both these points the cases referred to in *Gartshore v. Charlie*, *loc. cit.*

3. And generally the test for the application of the doctrine being the intention of the covenantor where the facts of the case make it clear that he did not intend the subsequent act as a performance of the covenant, it will not be held so to be. See the leading case of *Couch v. Stratton*, 1799, 4 Ves. 391; 31 E. R. 199; 4 R. R. 230. By his marriage settlement the husband covenanted by way of making some provision for his wife and her issue, to pay within three months after his death £6000 to the trustees in trust if the wife should survive him and there should be no issue, to pay £1500 to the wife, and the interest on the remaining £4500 to her for life; there was no issue of the marriage, and the husband died intestate; it was held that the widow's share under the Statute of Distributions was not a performance of the covenant. The fact that the husband had given a life interest was the chief index of his intention relied on. To quote the argument, the fund of £1500 being blended with the provision relating to the £4500, “it could not be the intention that a part of the sum secured by the whole effect of the entire covenant should be taken as a satisfaction, and the interest of the other part should not go likewise in discharge of the distributive share. If it is to turn upon the supposed intention, the same evidence that shows the intention that the £1500 is to go, as it were, into hotchpot, must likewise make, that the value of the life interest must be brought into hotchpot in the same manner.” And from this we may deduce that where the subject-matter of the covenant includes a life interest, the presumption of performance by devolution on intestacy is rebutted not only as regards such life interest itself, but also as regards any other gift blended with it.

Per Hundred.—Such a phrase as this will primarily receive its ordinary signification. At the same time if an Act of Parliament or custom has given to a phrase of quantity some definite specific meaning, and an instrument coming within such Act or custom uses it, the presumption will be that it is used in that sense. If the question is one of usage, parol evidence will be admissible to prove the customary sense of the phrase. So parol evidence may be given to show a custom to consider 1000 as equivalent to 100 dozen, or 100 ling or cod as meaning six score; for the word “hundred” does not mean necessarily that number of units, a hundredweight, for example, consisting of 112 lbs. (see *Smith v. Wilson*, 1832, 3 Barn. & Adol. 728; 37 R. R. 536).

Perils of the Road.—The general rule as to these is that the traveller takes his risk of injury by them (see *Young v. Davis*, *infra*;

CAVEAT ACTOR, Vol. II. p. 604, and the next reference), unless the injury is due to the actionable NEGLIGENCE of another, or to a NUISANCE, in respect of which he can sue. For an injury by the non-repair of a road no action lies against any public authority which ought to do the repairs (*Russell v. Men of Devon*, 1788, 2 T. R. 677; 1 R. R. 585; see *Saunders v. Holborn Board of Works*, [1895] Q. B. 64, and the cases there cited). It is doubtful how far this rule of non-liability extends to a private person who ought to repair (see *Young v. Davis*, 1862, 7 H. & N. 760). See further, Vol. VI. p. 555, and Vol. IX. pp. 568, 569.

A carrier of goods at the common law is liable to the owner for any damage they suffer by the perils of the road, or river (see CARRIER, Vol. II. p. 580), or sea (see CARGO, Vol. II. p. 570). As to the liability of a carrier, e.g. a railway company, in respect of passengers, see Vol. II. p. 587.

Perils of the Sea.—This is a common phrase in marine policies, charter-parties, and bills of lading to denote loss *ex marinæ tempestatis discrimine*, the natural accidents peculiar to that element, and even events not attributable to natural causes (Abbott, 5th ed., 253; cited by Carver, 84). Arnould defines the phrase as meaning, in policies, all kinds of marine casualties, such as shipwreck, foundering, stranding, and every species of damage to the ship or goods at sea by the violent and immediate action of the winds and waves, not comprehended in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate cause (812). In contracts of sea carriage the words “peril of the sea” have been defined as “sea damage occurring at sea and nobody’s fault” (Lopes, L.J., quoted in *Hamilton v. Pandorf*, 1887, 12 App. Cas. 518, 526), but this definition is not exhaustive, for damage caused by the negligent navigation of another ship colliding with the carrying ship is a peril of the sea (see *post*); and in a marine policy it has been defined as “all perils, losses, and misfortunes of a marine character or of a character incident to a ship as such” (Lord Bramwell in *Thames and Mersey M. I. C. v. Hamilton*, 1887, 12 App. Cas. 492). The expression has the same meaning in a contract of sea carriage as it has in a marine policy; but in the case of a contract of carriage the Court looks to what has been termed the remote as distinguished from the proximate cause of damage, whereas in the case of a policy the proximate cause can alone be regarded (Lord Watson, *Hamilton v. Pandorf*, above, and Lord Fitzgerald, *ibid.*); and thus under a policy a loss caused by a peril of the sea to the thing insured, which would not have arisen except for the negligence of the assured’s servants on board the ship, is recoverable from the underwriter, while in the like case, under a contract of sea carriage, in spite of the ordinary exception of losses by perils of the sea, the shipowner would still be liable, unless he has expressly excepted liability for his servants’ acts or negligence (*Dixon v. Sadler*, 1839, 5 Mee. & W. 405; 52 R. R. 774; *Grill v. General Iron S. C. C.*, 1866, L. R. 1 C. P. 600).

The following statement indicates the limitations of the phrase: “The term does not cover every accident or casualty which may happen . . . on the sea. It must be a peril of the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and

tear. There must be some casualty, something which could not be foreseen, as one of the necessary incidents of the adventure. The purpose of the policy (or contract) is to secure an indemnity against accidents which may happen, not against events which must happen. Not only losses which are occasioned by extraordinary violence of the winds or waves are losses by perils of the sea. . . . If a vessel strikes upon a sunken rock in fine weather and sinks, this is a loss by perils of the seas. And a loss by foundering owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. . . . Only one case throws a doubt upon the proposition that every loss by incursion of the sea due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body which penetrates it and causes a leak is a loss by a peril of the sea (*Cullen v. Butler*); but this stands alone, and has not been sanctioned by subsequent cases" (Lord Herschell, *The Xantho*, 1887, 12 App. Cas. 503, 509).

"Perils of the sea" include (a) damage by sea-water (*Hagedorn v. Whitmore*, 1816, 1 Stark. 157, ship taken in tow by a man-of-war, and in order to keep up with her carrying a press of sail in a gale and heavy sea, and thereby shipping water and damaging her cargo; *Montoya v. London A. C.*, 1851, 6 Ex. Rep. 451, hides and tobacco carried together, and the hides in bad weather becoming wetted and rotten, and tainting the tobacco); (b) damage by collision for which the ship carrying the cargo is not to blame (*The Xantho*, above); (c) damage by rats, a sunken rock, an iceberg or a swordfish (*Hamilton v. Pandorf*, above), or cannon shot (*Cullen v. Butler*, 1816, 5 M. & S. 461; 17 R. R. 400; but see *The Xantho*, above), which lets in sea-water; (d) damage to cargo by rough weather beyond the ordinary wear and tear of the voyage, if the stowage of the cargo was originally sufficient (*The Catherine Chalmers*, 1874, 32 L. T. 847), but not if this was carelessly and improperly done (*The Oquendo*, 1878, 38 L. T. 151); (e) captures by pirates (*Pickering v. Barkley*, 1648, Style, 132; 82 E. R. 587); or wreckers (*Bondrett v. Hentigg*, 1816, Holt, 149; 17 R. R. 625), or detention by officials of a foreign Government for fees and dues in respect of general average (*Dent v. Smith*, 1869, L. R. 4 Q. B. 414); (f) stranding of the ship, where this is fortuitous and does not necessarily arise in the course of the voyage (*Fletcher v. Inglis*, 1819, 2 Barn. & Ald. 315; 20 R. R. 448), e.g. by a light on shore being purposely extinguished (*Ionides v. Universal M. I. C.*, 1863, 14 C. B. N. S. 259; and see STRANDING, *post*); and (g) any damage done by the force of the elements, e.g. spars or cargo carried away in a gale, or cattle dying from the violent agitation of a ship in a storm (*Laurence v. Aberdeen*, 1821, 5 Barn. & Ald. 107; 24 R. R. 299).

On the other hand, perils of the sea do not include (1) the ordinary wear and tear; (2) the negligence of the shipowner or his servants in the stowage of cargo or the navigation or management of the ship; (3) the initial unseaworthiness of the ship (*The Glenfruin*, 1885, 10 P. D. 103); (4) war perils (*The Patria*, 1871, L. R. 3 Ad. & Ec. 436, avoiding an enemy port; *Taylor v. Curtis*, 1816, 6 Taun. 608; 16 R. R. 686, resisting a privateer); (5) arrest or confiscation of ship or goods in legal proceedings (*Spence v. Chodwick*, 1847, 10 Q. B. 517; 74 R. R. 417; *Benson v. Duncan*, 1849, 3 Ex. Rep. 644; 77 R. R. 776); (6) loss due to natural causes, e.g. cattle dying of hunger from want of food owing to prolongation of the voyage (*Gabay v. Lloyd*, 1825, 3 Barn. & Cress. 793; 27

R. R. 486; *Tatham v. Hodgson*, 1796, 6 T. R. 656; *Gregson v. Gilbert*, 1783, 3 Doug. 232), damage by sea-water to an electric cable not sufficiently insulated (*Paterson v. Harris*, 1861, 1 B. & S. 336), damage by worms (*Rohl v. Parr*, 1796, 1 Esp. 445; 5 R. R. 741), or by rats (*Laveroni v. Drury*, 1852, 8 Ex. Rep. 166; *Kay v. Wheeler*, 1867, L. R. 2 C. P. 302), or (in the United States) by cockroaches (*The Miletus*, 1866, Parsons' *Shipping* (1869), i. 258n.), or leakage (*Crofts v. Marshall*, 1836, 7 Car. & P. 597; 48 R. R. 828), or collocation of cargo, consisting of animal, vegetable, and to some extent putrescible matter, and want of due ventilation (*The Freedom*, 1871, L. R. 3 P. C. 594), or cargo damaged by the means of ventilation having to be kept closed for a week in exceptionally heavy weather at sea (*The Thrunscope*, [1897] P. 301); (7) barratry (*The Chasca*, 1875, L. R. 4 Ad. & Ec. 446); (8) or under an ordinary bill of lading, "shipped in good order and condition, etc.," any risks prior to the ship sailing with the goods on board, e.g. during the loading and stowing of the cargo (Lord Cairns and Lord Selborne, *Steel v. State Line*, 1877, 3 App. Cas. 72, 78, 84); (9) fire or lightning (Lord Bramwell, *Hamilton v. Pandorf*, above, 527).

A similar phrase to "perils of the sea," and often found either in addition to or substitution for it, is "dangers and accidents of the seas or navigation or management of the ship;" and its meaning is illustrated by the following decisions. Thus under a bill of lading excepting "dangers and accidents of the seas and navigation," the shipowner was held protected from liability for damage due to the negligence of lumpers who were engaged in discharging the cargo after the crew had left (*Laurie v. Douglas*, 1846, 15 Mee. & W. 746; 71 R. R. 820); under an exception of "loss or damage by improper navigation of the ship to goods on board her," the shipowner is protected from liability for loss during the voyage by a bilge-cock or a sea-cock being improperly left open (*Good v. London S.S. Owners' Association*, 1871, L. R. 6 C. P. 563). The word "navigation" covers bad stowage which would affect the sailing of the ship (*ibid.*); the overlooking of the machinery by a person on shore which causes the vessel to steer badly (*The Warkworth*, 1884, 9 P. D. 145); the insufficient closing of a port during the loading of the cargo; or sending a ship to sea without a compass; for "negligence before the navigation begins, which has the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, makes the navigation improper navigation by the shipowner" (Lord Esher, M.R., *Carmichael v. Liverpool Sailing Shipowners' M. I. A.*, 1887, 19 Q. B. D. 242, 248). Where by the rules of a mutual insurance association shipowners were protected in respect of "damage to goods on board when caused by the improper navigation of the ship," but not in respect of "damage caused by improper stowage," and cargo was damaged owing to a previous cargo not having been thoroughly cleaned out of the ship, this was held not to fall within "improper navigation" (but perhaps within "improper stowage") (*Canada Shipping Co. v. British Shipowners' M. P. A.*, 1889, 22 Q. B. D. 727; 23 *ibid.* 342). Under a charter-party "any act, neglect, or default of shipowners' servants, and all dangers and accidents of the seas . . . and navigation during the said voyage always excepted," where a valve in the engine-room was negligently left open by an engineer of the vessel during the loading of the ship at a port to which she had proceeded under the contract, the damage resulting therefrom was held covered by the exception (*The Carron Park*, 1890, 15 P. D. 203); while under a charter-

party excepting liability for "any act, negligence, or default of master and crew in the navigation of the ship in the ordinary course of the voyage," damage done in the port of discharge by a bilge-pump being negligently removed for repair by the chief engineer of the ship and the workmen of a marine engineer on shore was held not covered by the exception (*The Accomac*, 1890, 15 P. D. 208). Under a charter-party and bill of lading both excepting "perils of the sea . . . and other accidents of navigation, even when occasioned by the negligence of the master," damage to cargo done by a leak caused by heavy weather during the voyage, and not stopped owing to the negligence of the master, was held to be covered (*The Cressington*, [1891] P. 152). Under a bill of lading excepting "damage from any act, neglect, or default by pilot, master, or mariners in the navigation or management of the ship," damage done to a cargo of oranges by their improper stowage by the stevedore was held not to be covered (*The Ferro*, [1893] P. 38); and it was said that "bad stowage" does not fall within "navigation" (except as above), nor perhaps within "management" (Barnes, J., *ibid.* 46). Under a charter-party and bill of lading which exempted shipowners from liability for damage to cargo from "perils, dangers, and accidents of the sea or other waters, strandings . . . and all other accidents of navigation . . . even when occasioned by negligence, default, or error in judgment of the shipowners' servants, but unless stranded, sunk, or burnt nothing to exempt shipowner from liability to pay for damage to cargo . . . by improper opening of valves . . . or causes other than those above excepted," where the engineer negligently omitted to close a valve which he had opened in the side of the ship as she lay at her moorings, and the cargo was thereby damaged, and the master, to prevent the ship sinking, had her towed into shallow water, where she settled, it was held that the negligence clause applied to "dangers and accidents of the sea and other waters" as well as "accidents of navigation," and that the words "unless stranded, sunk, or burnt" protected the shipowner from liability for the damage done by the valve being left open; and Barnes, J., intimated that he was inclined to consider that accidents of navigation covered the loss, the vessel having a cargo in her, and something being done for a proper purpose affecting its safety at the time that the accident occurred (*The Southgate*, [1893] P. 329, 337). Where a charter-party incorporated the provisions of the United States Harter Act of 1893, by which shipowners are bound to use due diligence in making the ship seaworthy and properly supplied and manned, but are not liable for faults or errors in the navigation and management of the ship, and the ship went to sea unseaworthy owing to the negligence of the ship's carpenter, the shipowner was held liable (*Dobell v. Rossmore S. S. Co.*, [1895] 2 Q. B. 408, 415); and under a similarly expressed bill of lading, where the ship after her arrival at her port of discharge had to be stiffened, and the engineer filled a ballast tank without first ascertaining the conditions of the sounding pipe and casing, which had been broken by heavy weather during the voyage, and water thereby got in and damaged the cargo, it was held that the shipowner was exempt from liability, the loss being covered by the "management" of the vessel, which extended to the time of discharge of cargo, as well as to the time of the ship being at sea (*The Glenochil*, [1896] P. 10); and so in *Rowson v. Atlantic Transport Co.*, [1903] 2 K. B. 666, where the bill of lading incorporated the Harter Act, the shipowner was held protected against mismanagement of the refrigerating apparatus as a fault

in the management of the ship. "Management" goes somewhat beyond (perhaps not much beyond) "navigation," but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself (Jeune, P., *ibid.* 16). It means a fault in the management of the vessel in doing something necessary for the safety of the ship herself; and generally all exemptions extend from the time the cargo is taken on board to the discharge, though the terms of the exemptions themselves may not necessarily cover the particular act (Barnes, J., *ibid.* 19); and the term includes the period of loading (*McFadden v. Blue Star Line*, [1905] 1 K. B. 697).

Under a bill of lading, excepting perils of the sea, but not negligence of the master and crew, the shipowner need only prove that the loss apparently falls within perils of the sea, and need not show that it was a peril of the sea not occasioned by his fault (*The Glendarroch*, [1894] P. 226).

In the statutory policy (see MARINE INSURANCE), the words "and all other perils" follow after the enumerated perils. These words, however, only include "cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes" (Lord Ellenborough, *Cullen v. Butler*, 1816, 5 M. & S. 461; 17 R. R. 400, confirmed in *Thames and Mersey M. I. C. v. Hamilton*, 1887, 12 App. Cas. 484, 498, Lord Herschell; and see *Borthwick v. Elderslie S. S. Co.*, [1904] 1 K. B. 319; [1905] A. C. 93, the enumerated "perils and all other causes whatsoever;" *The Torbryan*, [1903] P. 194, "all other accidents;" *Blackburn v. Liverpool, Brazil, and River Plate S. N. C.*, [1902] 1 K. B. 290, "negligence, default, or error in judgment of engineers or otherwise howsoever;" and *Jackson v. Mumford*, 1902, 19 T. L. R. 182, "all other perils and misfortunes"). The following losses have been held to fall within this clause: where a British ship was fired upon and sunk by another, which mistook her for an enemy (*Cullen v. Butler*, 1816, 5 M. & S. 461; 17 R. R. 400); dollars thrown overboard by a master at the moment of capture, to prevent their falling into the hands of the enemy (*Butler v. Wildman*, 1820, 3 Barn. & Ald. 398; 22 R. R. 435); ship in a graving dock thrown over by a violent gust of wind (*Phillips v. Barber*, 1821, 5 Barn. & Ald. 161; 24 R. R. 317); ship bilged and rendered incapable of pursuing her voyage by the accidental giving way of her tackle or supports while being moved out of a dock where she had been placed for repairs (*Devaux v. T Anson*, 1839, 5 Bing. N. C. 519; 50 R. R. 786); cargo damaged by sea-water entering through waste-pipe accidentally left open (*Davidson v. Burnand*, 1868, L. R. 4 C. P. 117). The clause has been held not to include a meat cargo going bad owing to delay on the voyage by bad weather (*Taylor v. Dunbar*, 1869, L. R. 4 C. P. 206); and the bursting of the air-chamber of a donkey-pump by cold sea-water being forced up into it, owing to the accidental or negligent closing up of a valve at the end of a supply pipe connecting the donkey-pump with the ship's boilers, does not come either within "perils of the sea" or the general words (*Thames and Mersey M. I. C. v. Hamilton*, above, 498).

[*Authorities*.—Abbott, *Shipping*, 14th ed., 1901; Carver, *Sea Carriage*, 4th ed., 1905; Scrutton, *Charter-Parties*, 5th ed., 1904.]

Perinde valere.—A dispensation formerly obtainable from the Pope by a clerk admitted to a benefice which he was incapable of holding, and so named from the words of the dispensation, which

made the admission as effectual as if he were capable (Gibson, *Codex*, p. 87). The right of granting such dispensations was among those taken from the Pope in 1533, and vested in the Archbishop of Canterbury by the statute 25 Hen. VIII. c. 21.

Periodical Publications.—See COPYRIGHT.

Perishable Goods.—Where goods, the subject of a contract of sale, are of a perishable nature, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract (Sale of Goods Act, 1893, s. 48 (3)).

A common carrier is not bound to carry perishable goods, such as fish (Macnamara on *Carriers*, pp. 23, 77; see *Beal v. South Devon Rly. Co.*, 1860, 5 H. & N. 875), which he does not profess to carry. If he takes them and holds them under his lien, he must exercise proper care to preserve them (Macnamara, p. 102). It is the duty of the sender, where the goods sent require special care, to give notice to the carrier. If no such notice is given, and the necessity is not apparent, the carrier need only treat them in the usual way (*Baldwin v. L. C. & D. Rly. Co.*, 1882, 9 Q. B. D. 582). He is not liable for damage to the goods caused by reason of their condition (see *CARRIER*, Vol. II. p. 584; *The Ida*, 1875, 32 L. T. N. S. 541; Carver, *Carriage by Sea*, 4th ed., s. 12). Loss by deterioration, where it is an ordinary probable consequence of delay, so far as it might be expected to happen to goods of the kind, is recoverable from the carrier as damages if he is liable for the delay (*Haves v. S.-E. Rly. Co.*, 1885, 52 L. T. 514). The master of a ship has authority to sell goods forming part of the cargo if there is a "commercial necessity" to do so in order to save them (Carver, ss. 297-301; see *Atlantic Mutual Insurance Co. v. Huth*, 1880, 16 Ch. D. 474).

It is provided by Order 50, r. 2, that it shall be lawful for the Court or a judge, on the application of any party (*i.e.* to proceedings pending in respect to the goods), to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature, or likely to injure from keeping. Shares in a limited company, though they are "goods," are not "perishable" within the meaning of this order (*Evans v. Davies*, [1893] 2 Ch. 216). See note to the rule in the *Annual Practice*; and also, as to the protection of a purchaser on such sale, *Conveyancing Act*, 1881, s. 70.

Perjury.—**HISTORY.**—Perjury, like **FORGERY**, has a somewhat curious history in English law. It rarely if ever appears in the earlier records as an offence cognisable by the temporal Courts; and the fact that neither forgery nor perjury were within the cognisance of Courts of Quarter Sessions (*R. v. Bartlett*, 1843, 12 L. J. M. C. 127; *Hawk. P. C.*, bk. ii. c. 8) suggests either (1) that when the commission of the peace was established the offences did not exist; or (2) that they were not then regarded as trespasses or even offences against the King's peace (*Archb. Quarter Sessions*; Pritchard, *Quarter Sessions*, 2nd ed.).

There is evidence that oath-breaking was punished under Anglo-Saxon laws, but that half the wite went to the bishop, and for some

time after the Conquest it was ordinarily punished as a spiritual offence only (2 Pollock and Maitland, *Hist. Eng. Law*, 539-541).

Plaintiffs or prosecutors who failed in legal proceedings were amerced *pro falso clamore*, or, if suing as paupers, were whipped; but this procedure is merely a substitute for what is now effected by giving costs, since under the early mode of trial in England the parties could not give evidence, and no sworn evidence was given (*ibid.*, p. 541). The inquests or assizes were themselves the witnesses in substitution for the old compurgators, and the earliest proceeding at all resembling perjury was that by writ of attaint against an assize, which had brought in a false verdict in civil proceedings (1 Pike, *Hist. Cr.*, 126, 202, 386; 2 Pollock and Maitland, *Hist. Eng. Law*; and see ATTAINT).

But under the systems of compurgation and frankpledge undoubtedly an enormous amount of false swearing took place unpunished; and under the jury system local option and independence asserted itself by false verdicts, which saved the district or the accused whom they favoured (1 Pike, *Hist. Cr.*, 57-61).

Even when the practice of calling witnesses on oath came in, it was not until 1702 extended to witnesses for the defence in treason or felony (1 Anne, st. 2, c. 9, s. 3),

Coke (3 *Inst.* 163) deals with perjury as an offence at common law punishable by fine and imprisonment, and cites a case in the Star Chamber where, as late as 1612, it was argued and decided that perjury in a witness for the King was punishable by the common law (*In re Rowland ap Eliza*, 3 Co. *Inst.* 164).

This opinion has, with whatever historical warrant, now become firmly established. But it was not so in the sixteenth century. In 1495 (7 Hen. VII. cc. 24, 25) provision was made for writs of attaint for false verdicts and proceedings against inquests (juries) for perjury in the King's Courts or in Chancery, and a like provision was made by c. 21 for perjury by London juries. In 1541 (32 Hen. VIII. c. 9, s. 3) a penalty was imposed for the subornation of witnesses by letters, rewards, promises, or by any other sinister labour or means . . . to the procurement or occasion of any manner of perjury by false verdict or otherwise in any manner of Court "of the King." In 1563 (5 Eliz. c. 9) the Act of 1541 was recited; and increased penalties were imposed for such subornation in any secular Court; and wilful and corrupt perjury by witnesses was made punishable by fine of £20, imprisonment, and disqualification to testify. Jurisdiction was given to Courts of Assize and Quarter Sessions (s. 3). Perjury in spiritual Courts was left untouched (s. 5). By sec. 7 there were reserved all pre-existing powers of any judge having absolute power to punish perjury.

The passing of these Acts indicates that the early conception of perjury was perjury by false verdict. This has disappeared from the category of offences; jurors, except in the case of consenting to EMBRACERY, having absolute and almost judicial immunity.

The Act of Elizabeth certainly suggests that perjury by witnesses was then for the first time made an offence cognisable by the temporal Courts. But on the general adoption of Coke's view, the statutes of the sixteenth century, while even now unrepealed, have fallen into disuse, and prosecutions for perjury are always for the common-law perjury or under specific statutes containing a special perjury clause. None of these statutes contains a complete definition of the offence, and recourse must therefore be had to the supposed common-law definition.

Coke defines perjury as a crime committed when a lawful oath is administered by a person having authority to do so, to any person in any *judicial proceeding* who swears *absolutely* and falsely in a matter immaterial to the issue or cause in question, whether by his own act or the subornation of others (3 Co. *Inst.* 164).

Qualified by his explanation that the authority to administer the oath must be derived from a commission recognised by the common law (3 Co. *Inst.* 165), the definition almost correctly states the law as now understood with respect to common-law perjury. But this limitation, coupled with legislative caution, has been the cause of the passing of very many enactments imposing the penalties of perjury on persons falsely swearing before authorities created by statute. Attempts were unsuccessfully made in 1894, 1895, and 1896 to pass a Perjury Act to give the offence a sufficiently wide statutory definition, and to repeal and supersede most of these enactments. Most of the very numerous statutes providing for the punishment of particular forms of perjury and kindred offences are collected in the Official Index to the Statutes, tit. "Perjury."

MODERN LAW.—This statement of the history of the subject indicates the confusion and complexity caused by absence of any systematic dealing with the offence.

In the Criminal Code Bill of 1880 it was proposed to treat perjury and kindred offences, involving the making of false statements intended to be used as evidence, under three classes:—

- (1) False statements on oath in judicial proceedings;
- (2) False statements on oath otherwise than in judicial proceedings;
- (3) False statements not on oath.

The best modern definition of perjury is that of Stephen: "An assertion upon an oath duly administered in a judicial proceeding before a competent Court of the truth of some matter of fact material to the question depending in that proceeding, which assertion the assertor does not believe to be true when he makes it, or on which he knows himself to be ignorant" (see *R. v. Aylett*, 1785, 1 T. R. 63; 1 R. R. 152). It is immaterial whether the assertion is oral or in writing, *e.g.* by affidavit (52 & 53 Vict. c. 10, s. 7). The statutes permitting affirmation instead of oath make the witness who affirms falsely subject to the penalties of perjury (3 & 4 Will. iv. c. 49; 1 & 2 Vict. c. 77; 51 & 52 Vict. c. 46; 52 & 53 Vict. c. 63, s. 3). The form of the oath is immaterial so long as it is binding on the conscience of the person taking it, and acceptance of the form is an admission that it is so binding (1 & 2 Vict. c. 105; *Sells v. Hoare*, 1822, 3 B. & B. 232). It would seem that the witness must be competent (*R. v. Clegg*, 1868, 19 L. T. N. S. 47); and a prisoner being now a competent witness in his own behalf is indictable for perjury if he gives false evidence (*R. v. Baker*, [1895] 1 Q. B. 797).

Stephen's explanation, of "duly administered," goes beyond Coke's definition. It is "administered in a form binding on his conscience to a witness legally called before a Court, judge, justice, officer, commissioner, arbitrator, or other person, who, by the law for the time being in force or by the consent of the parties, has authority to hear, receive, and examine evidence." This is really an expansion of the old definition by the light of sec. 16 of the Evidence Act, 1851, 14 & 15 Vict. c. 99, passed in consequence of *R. v. Hallett*, 1851, 2 Den. Cr. C. 237, so as to legalise the administration of an oath in the case of all tribunals public or domestic. Under that section "every Court judge, justice, officer,

commissioner, arbitrator *now or hereafter having by law* or consent of parties authority to hear, receive, and examine evidence is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

To make the proceeding "judicial," it must be one taken in the course of a civil, criminal, ecclesiastical, military, naval, or other trial or inquest, or a proceeding of a judicial nature, in which evidence is taken on oath and examined with a view to establish a right, liability, or obligation: such as an arbitration (52 & 53 Vict. c. 49, s. 22); and it appears to include proceedings before a committee of either House of Parliament hearing witnesses, or before any other special tribunal appointed by the Crown and having authority to administer an oath (*R. v. Tomlinson*, 1866, L. R. 1 C. C. R. 49). Perjury before committees of either House has *ex cantellâ* been made punishable by statute. The tribunal must be competent to deal with the case in which the false assertion is made, otherwise the proceeding is *coram non judice*. The distinction between competence and regularity of procedure is clearly stated in *R. v. Hughes*, 1879, 4 Q. B. D. 614; *R. v. Johnson*, 1872, L. R. 2 C. C. R. 15. As already pointed out, in the case of a Court or person not having authority at common law to administer an oath, reference must be made to a statute giving such authority. The question whether the proceeding is judicial or not is rendered unimportant in the case of oaths administered under Acts which contain a perjury clause. For instance, false oaths before certain persons for the purpose of marriage are punishable as perjury, though the proceeding cannot be described as judicial (*R. v. Chapman*, 1849, 31 L. J. M. C. 152; 6 & 7 Will. IV. c. 85, s. 38); and a similar provision is made as to affidavits on registration of a bill of sale *ante* (*R. v. Hodgkiss*, 1870, L. R. 1 C. C. R. 212; 41 & 42 Vict. c. 31, s. 17). Coke's definition somewhat differs from that of Stephen. In speaking of swearing "absolutely" as to a matter, Coke considered that swearing to opinion was not perjury; but this is inconsistent with modern decisions, e.g. *R. v. Schlesinger*, 1847, 10 Q. B. 670.

The fact or opinion sworn to must be material or relevant to the matters into which the tribunal is inquiring, *i.e.* of such a nature as directly or indirectly to affect the probability of the existence of any fact to be determined in the inquiry or the credit of a witness, although evidence of its existence was improperly admitted (*R. v. Gibbon*, 1861, L. & C. 109; *R. v. Philpotts*, 1851, 2 Den. Cr. C. 302). It had been doubted whether false answers to questions going to credit only were material (*R. v. Mullaney*, 1865, L. & C. 593), but in *R. v. Baker*, [1895] 1 Q. B. 797, they were held to be material.

It has been at times suggested that perjury or prevarication can be summarily dealt with as contempt of Court, but there is no judicial decision to this effect. It is a common-law misdemeanor, punishable by fine or imprisonment, to make false statements on oath in proceedings which are not judicial, or to fabricate documentary or other evidence for use in a judicial proceeding (*R. v. Vreones*, [1891] 1 Q. B. 360).

The common law has been supplemented by many statutes punishing false statements made on oath, which are enumerated in the Official Index to the Statutes (1907 ed.).

There are also many statutory offences akin to perjury with respect to statements, certificates, or declarations not made on oath or the equivalent affirmation, but made at the command or under the authority

of Courts, judges, or magistrates, or by or in pursuance of statutes or Orders in Council, rules, by-laws, or other instruments under statutes. The most important Act is the Statutory Declarations Act, 1835, 5 & 6 Will. IV. c. 62, under which statutory declarations have been substituted for oaths on the verification of very many matters concerned with the public revenue or questions of title to property.

Subornation, etc.—Subornation of perjury was punishable in the same way as perjury under the Acts of 1541 and 1563, and is specially referred to in the Acts relating to punishment mentioned below. It is the inciting, counselling, or procuring a witness to commit perjury which is actually committed, and falls within the common law as to such offences, and is also covered by sec. 8 of the Accessories, etc., Act, 1861.

Counselling or procuring the commission of the cognate offences already mentioned is also indictable or summarily punishable in the same manner as the principal offence, if it is committed. When the principal offence is not committed, incitement to the commission of perjury or any cognate indictable offence is a misdemeanor (see INCITEMENT and CONSPIRACY). What is hereafter said as to punishment and procedure with respect to perjury applies to subornation of the offence, save that to convict of subornation the principal offence must also be charged and proved.

The fabrication of evidence for use in a judicial proceeding is an indictable misdemeanor, even if no perjury is in fact committed (*R. v. Vreones*, [1891] 1 Q. B. 360).

Punishment.—The statutory penalties under the Acts of 1541 and 1563 are never inflicted. The common-law penalty was fine and imprisonment and PILLORY, or by requiring sureties (*Dunn v. R.*, 1849, 12 Q. B. 1026).

In 1729 (2 Geo. II. c. 25, s. 2) Courts were authorised to punish wilful and corrupt perjury, or subornation of it, by imprisonment with hard labour for not over seven years, or transportation over seas for a like period. Power to imprison with hard labour for wilful and corrupt perjury is also given by 3 Geo. IV. c. 114. Sentences of imprisonment with hard labour for more than two years are not now in practice imposed; and it would seem that the term fixed in 1729 is superseded by the Penal Servitude Act, 1891, 54 & 55 Vict. c. 69, s. 1. By the same enactment penal servitude for not less than three nor more than seven years has been substituted for transportation. These Acts apply to false oaths taken in a manner authorised by subsequent statutes. It is not necessary to impose fine and imprisonment as well as penal servitude; and successive sentences of penal servitude may be imposed on different counts in the same indictment (*Castro v. R.*, 1881, 6 App. Cas. 229).

Procedure.—Perjury is at common law triable in the judicial district in which the false oath is taken. Provision is, however, made in certain statutes that perjury in an affidavit or a deposition taken on commission shall be triable in the district where the cause was pending in which the affidavit or deposition was taken (52 & 53 Vict. c. 10, s. 9).

No Court of Quarter Sessions has jurisdiction to try perjury or subornation of perjury, or making or suborning any other person to make a false oath, affirmation, or declaration punishable as perjury or as a misdemeanor (5 & 6 Vict. c. 38, s. 1 (6), (7)). The Vexatious Indictments Act, 1859, 22 & 23 Vict. c. 17, applies to all prosecutions

for perjury or subornation of perjury, but is not so framed as to include the cognate offences just mentioned. It does not extend to prosecutions instituted by the direction or with the written consent of a judge of the Supreme Court, or of the Attorney-General or Solicitor-General, or by the direction of any other Court, judge, or public functionary authorised by sec. 19 of the Criminal Procedure Act, 1851, 14 & 15 Vict. c. 100, to direct a prosecution for perjury in evidence given before him, *i.e.* besides the judges of the Supreme Court, Courts of Quarter Sessions, and the judges or deputy judges of inferior civil Courts of Record. Where prosecutions are ordered under the Act of 1859, the accused may be committed for trial without preliminary inquiry, and the costs of prosecution may be paid, as in cases of felony, on production of a certificate that it was so ordered.

By secs. 20, 21 of the Act of 1851 an attempt was made to simplify the form of indictments for perjury, or unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly making or signing oaths, affirmations, affidavits, depositions, notices, certificates, or other writings, or for suborning, bargaining, or contracting for, or inciting, counselling, or procuring any of these offences. By virtue of these enactments it is unnecessary to set out the commission of the Court in which the perjury was committed, or any part of the proceedings, or the document alleged to have been falsely sworn to, and it is sufficient to state the substance of the offence and specify the Court or person before whom the false oath was taken: and on indictment for subornation it is enough to set out the perjury as above, and then to aver that the suborner unlawfully, wilfully, or corruptly did cause and procure the perjurer the said offence in manner and form aforesaid, to do and commit. But it is also possible, and simpler, to indict the suborner as a principal offender under sec. 8 of the Accessories, etc., Act, 1861.

These enactments also render it needless to aver the competence of the Court in which the perjury was committed, or to go into detail as to the nature of the judicial proceedings in which it was committed (*R. v. Dunning*, 1871, L. R. 1 C. C. 290), or the nature of the authority of the person administering the oath (*R. v. Callanan*, 1826, 6 Barn. & Cress. 102). But see *R. v. Macdonald*, 1905, 21 Cox, 70, as to perjury before a Commissioner of Oaths.

The precedents in use (see Archbold, *Cr. Pl.*, 23rd ed.) are still, from excess of caution, detailed, and prolix. The essentials of the indictment are: "It is usual and generally prudent to state in the introductory part of the indictment circumstances, which show that the oath was taken in a judicial proceeding before a competent jurisdiction, and was material to the matter then before the Court. The oath is then set out, and the perjury is then assigned on it, *i.e.* some one or more of the affirmative assertions in it are negatived, or the negative assertions contradicted by its opposite affirmative" (Archbold, *Cr. Pl.*, 23rd ed., 1055). It is expedient also where the materiality is not obvious from the oath to insert the innuendoes necessary to explain the oath and show its materiality.

It was held in *R. v. Cox* (1770, Leach, 65) that in an indictment for common-law perjury, the word "wilful" need not be inserted, and that "falsely, maliciously, wickedly, and corruptly" are the proper terms of art. But the word is necessary in an indictment under the Act of 1563, and to warrant punishment under 2 Geo. II. c. 25, s. 2, must be inserted, and is now always inserted.

It is not uncommon, but is superfluous, to insert a syllogistic conclusion; "and so the jurors aforesaid, on their oath aforesaid, do present that the defendant, on the day of before , by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God (a relic of the ecclesiastical aspect of the crime) and in contempt of our Lord the King and his laws, and against, etc." (*Ryalls v. R.*, 1847, 11 Q. B. 781; *R. v. Hodgkiss*, 1870, L. R. 1 C. C. 212).

Evidence.—The one exceptional rule of evidence as to perjury is that a conviction may not take place unless the falsity of the oath is confessed or is proved by two witnesses, or by one witness corroborated by proof of other material and relevant facts (Archbold, 23rd ed., 1061).

It is also necessary to show that the oath was not only false but recklessly or deliberately false, and usually that the accused had his attention pointedly called to the question involved, so as to exclude the hypothesis of inadvertence or mistake (*R. v. London*, 1871, 12 Cox. C. C. 50).

The further matters which must be proved in a prosecution for perjury, are that the oath was lawfully administered by a competent Court or person; that the statements made were material to the question in controversy; that the proceeding was judicial, or one to false swearing wherein the penalties of perjury attach; and that the statement was false, to the knowledge of the person who made it.

But on failure to prove the proceeding to be judicial, the accused may still be convicted of the misdemeanor of taking a false oath (*R. v. Hodgkiss*, 1870, L. R. 1 C. C. R. 212).

Where the Court or person administering the oath has a limited jurisdiction, it is necessary to prove all the facts necessary to give such jurisdiction (*R. v. Lewis*, 1871, 12 Cox C. C. 163; *R. v. Evans*, 1890, 17 Cox C. C. 37; *R. v. Shaw*, 1865, L. & C. 579). But this does not preclude liability for perjury where an irregularity in procedure has occurred, and has been lawfully waived (*R. v. Fletcher*, 1871, L. R. 1 C. C. 320); or is of a trifling character (*R. v. Western*, 1868, L. R. 1 C. C. 122). But where a registrar in bankruptcy swore a witness, and was not present at his examination, the irregularity was held fatal (*R. v. Lloyd*, 1887, 19 Q. B. D. 213).

The nature of the proceedings pending must be proved by producing the record, if any, or the documents on which the proceeding was founded, subject, in the case of perjury at a trial for felony or misdemeanor, to a right to prove that trial by certificate without making up the record (14 & 15 Vict. c. 100, s. 22), or in a civil trial, or the High Court, to the production of the record or an examined copy (14 & 15 Vict. c. 99, s. 13; 14 & 15 Vict. c. 100, s. 22); or official documents emanating from the Court showing the nature and result of the trial (*R. v. Scott*, 1877, 2 Q. B. D. 415).

[*Authorities.*—Archbold, *Cr. Pl.*, 23rd ed.; Roscoe, *Crim. Ev.*, 13th ed., 676; Stephen, *Dig. Cr. Law*, 6th ed.; Russell on *Crimes*, 6th ed.; Mayne, *Indian Cr. Law*, 1896 ed., p. 503.]

Permissive Waste.—See WASTE.

Permutation.—A writ directed to the Ordinary, commanding him to admit a clerk to a benefice upon an exchange.

Per my et per tout.—See JOINT-TENANCY, Vol. VII., at p. 513.

Pernancy.—The taking or receiving (*prendre*) anything, *e.g.* tithes that are or may be taken in kind.

Per Pais, Trial by.—See ACT IN PAIS.

Perpetual Annuity.—As a general rule, a gift of an annuity to a person is a gift of an annuity for life, and nothing more (*Blight v. Hartnoll*, 1881, 19 Ch. D. 294; *Re Morgan*, [1893] 3 Ch. 222). But where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that the annuity is to exist beyond the annuitant's life, then the annuity is presumed to be a perpetual annuity.

In those cases where the Court has come to the conclusion that a gift of the annuity is a gift of the income of a particular fund without limit it has held that the unlimited gift of the income is a gift of the *corpus* from which the income arises. If the annuity is given by deed without words of limitation, a life-interest alone passes to the annuitant. It is only, therefore, in the case of wills that the question of what amounts to a sufficient expression of intention to give a perpetual annuity has to be considered. For a case where an annuity was held to endure beyond the life of the first taker (see *Re Yates*, [1901] 1 Ch. 438).

A gift to A. or his descendants gives the various annuitants gift for life only, and *or* will not be read as *and*, so as to give a perpetual annuity (*In re Morgan, ubi supra*); and a gift of "an annuity of £500 a year to be secured to X." is merely an annuity to X. for life, and no more (*In re Lord Stratheden and Campbell*, 1893, [W. N.] 90). The fact that the annuity is charged upon any particular fund, or a fund given on trust to pay the annuity thereout, or even that the annuity is charged on real estate, does not constitute an indication of an intention that it shall be perpetual (*Blight v. Hartnoll, ubi supra*; *In Re Morgan, ubi supra*); and even where there is a gift of residue to trustees upon trust, to invest £10,000 in Consols and retain so much as would realise a clear yearly income of £150, and pay the dividends to the beneficiary, with a gift over on bankruptcy or alienation, the gift of income is not perpetual (*Banks v. Braithwaite*, 1862, 11 W. R. 298). It is perhaps impossible to reconcile *Re Morgan, ubi supra*, with *Burt v. Cullen*, L. R. 6 Ch. 235.

The cases where, otherwise than by virtue of very clear words to that effect, an annuity has been held to be perpetual are mostly old cases, and the circumstances from which an intention to give a perpetual annuity has been deduced may be thus classified:—

1. A direction contained in the will for gift over or cesser if the annuitant dies without issue, clearly points to an intention to confer more than a life annuity; and a bequest of, *e.g.* £40 a year out of Four per Cent. Bank Stock, followed by a direction that the stock shall not be sold till after the death of the legatee and his wife, nor till his youngest son shall attain twenty-one, is a perpetual annuity (*cp. Potter v. Baker*, 1852, 15 Beav. 489; 51 E. R. 105; *Stokes v. Heron*, 1845, 12 Cl. & Fin. 161; 8 E. R. 1361; 69 R. R. 83; *Pawson v. Pawson*, 1854, 1 Q. B. 146; *Robinson v. Hunt*, 1843, 4 Beav. 450; 49 E. R. 413; 55 R. R. 136). But a gift over of the annuity on the death of the first

annuitant to other annuitants was held to be a gift of annuities for lives only (*Wilkins v. Jodrell*, 1879, 13 Ch. D. 564; *Ward v. Ward*, [1903] 1 I. R. 211).

2. Generally, where, as above stated, the bequest can reasonably be said to be equivalent to a gift of income without reference to any time limit, or where annuities are given *simpliciter* and there follows a direction amounting in effect to a dedication of a portion of the *corpus* of the testator's property to produce the particular annuity (*Kerr v. Middlesex Hospital*, 1852, 2 De G., M. & G. 576, 587; 42 E. R. 996); *e.g.* annuity to a widow until she should marry again, or the fund out of which the annuity was payable should be exhausted (*Re Howard*, [1901] 1 Ch. 412).

3. A gift may be unlimited in time and in terms though a gift of residue follow; for the latter, in such case, amounts to no more than a gift of all that shall remain after the testator's wishes have been complied with (cp. *Hicks v. Ross*, 1872, L. R. 14 Eq. 141, and cases there cited).

The cases will be found collected in Hawkins on *Wills*, 128 *et seq.*; Theobald on *Wills*, 414; 1905 ed., pp. 465, 486; and see ANNUITIES; WILL.

Perpetual Curate.—The word “curate” originally applied to all clerics having the cure of souls. In the Church of England at the present time the use of the word is practically limited to two classes of ministers—namely (1) Curates, popularly so called, who are clerks in either deacon's or priest's orders employed under the bishop's licence, and usually at an annual stipend, to assist a rector or vicar to execute his office in the parish; and (2) Perpetual curates, who, properly speaking, are clerks in holy orders officiating in a parish where there is no spiritual rector or vicar, and for that purpose nominated by the impropiator and licensed by the bishop. The term “perpetual curate” is also applied to the ministers of separate parishes, ecclesiastical districts, consolidated chapelries, and district chapelries formed under the Church Buildings Acts of 1831, 1839, and 1843, 1 & 2 Will. iv. c. 38, s. 12; 2 & 3 Vict. c. 49, s. 2; 6 & 7 Vict. c. 37, s. 12.

The historical origin of the office of perpetual curate is explained in the article LAY IMPROPRIATOR. It will suffice to repeat here that if a benefice was given to a monastery *in mensam monachorum*, and was granted by way of union *pleno jure*, it did not become a vicarage under 4 Hen. iv. c. 12 (5), but continued to be served by a temporary curate. Dispensations were also sometimes given to monasteries to hold benefices not annexed *ad mensam*, in the same way, either because of the poverty of the monastery or because they were near to the church. When such appropriations, together with the charge of providing for the cure, were transferred to laymen at the dissolution of the monasteries, such laymen were unable to serve the cures themselves, and were therefore obliged to nominate some person to the bishop for his licence to serve the cure. The curates so appointed therefore acquired a certain fixity of tenure in their benefices, as they were not removable at the pleasure of the impropiator, unless their licence had been duly revoked by the ordinary.

The position of a perpetual curate was dealt with in 1714 by the Act 1 Geo. I. st. ii. c. 10, s. 4, which for some purposes put him in the position of a vicar, providing that all curacies, chapels, or churches

augmented by Queen Anne's Bounty should, from the time of such augmentation, be perpetual cures and benefices, and the ministers thereof corporations sole (see also ss. 6 *et seq.*). Land annexed to a perpetual curacy by Queen Anne's Bounty under this Act cannot be leased by the curate to bind his successor, without the consent of the ordinary as well as of the patron (*Doe d. Richardson v. Thomas*, 1839, 9 Ad. & E. 556; 48 R. R. 589).

The old idea of the perpetual curate as a mere stipendiary rather than an incumbent continued for some purposes, as when (in *Jenkinson v. Thomas*, 1792, 4 T. R.) it was held that the curate of a curacy augmented under Queen Anne's Bounty was not liable as a parson or vicar to the penalties of 21 Hen. VIII. c. 13, for non-residence, so that such perpetual curacy could be held with another benefice; but this state of things was altered by the Pluralities Act of 1838, 1 & 2 Vict. c. 106. For certain other purposes, however, the Courts have treated a perpetual curacy as a benefice, *e.g.* that it was a cure of souls to which, to enable the curate to be admitted, he must obtain the bishop's licence and subscribe to the Thirty-nine Articles and Declaration of Conformity (*Powell v. Milbank*, 1872, 1 T. L. R. 39 (note)). The Clerical Subscription Act, 1865, 28 & 29 Vict. c. 122 (as to which see ENTRY ON BENEFICE), is expressly applied to a perpetual curacy.

To determine whether a place is a perpetual curacy, or merely a chapelry, the points to consider are—(1) Whether the chapel possesses parochial rights, *e.g.* clerk, wardens, sepulchre, etc.; (2) Whether the inhabitants possess parochial rights there, or whether they have to attend the mother-church for sacraments, etc.; (3) Whether the curate is entitled to rights and dues, *e.g.* surplice fees, small tithe, etc. If the place possesses these things it will unquestionably be a perpetual curacy. An action in the Chancery Division of the High Court appears to be the proper mode of establishing the right of a place to be a perpetual curacy (*A.-G. v. Brereton*, 1752, 2 Ves. 424; 28 E. R. 554).

A perpetual curate differs from a rector or a vicar, properly so called, in that he has possession of the church and churchyard so far only as may be necessary for the performance of his sacred duties; but he has not such an estate as will enable him to take the profits arising from the use of the churchyard for secular purposes, and therefore cannot restrain by injunction the lay impropiator (or his tenants), in whom the soil and herbage of the churchyard is vested, from depasturing the same (*Greenslade v. Darby*, 1868, L. R. 3 Q. B. 421). -The reason for this is that the perpetual curate does not stand in the position of a vicar under 4 Hen. IV. c. 12, and that he can be presumed to have no further possession than necessarily flows from the fact that he has to perform certain duties, and must have a certain possession for that purpose. In certain cases, however, the rights of the lay impropiator may be restrained by local custom; and in many cases a perpetual curate has acquired a *quasi-fee* in the soil of the churchyard as against the common-law rights of the impropiator (see opinion of Lord Stowell, cited Phillimore, *Eccl. Law*, 2nd ed., i. 227-229). The question, therefore, as to his exact rights on these points will depend on the circumstances of the particular place. A perpetual curate of a parochial chapelry augmented under Queen Anne's Bounty has, however, such an interest in the chapel as to maintain an action against any person entering the chapel and removing pews; and the chapelwardens may not remove pews without his consent (*Jones v. Ellis*, 1828, 2 Y. & J. 268; 31 R. R.

589). Augmented churches and chapels to which a district is assigned became perpetual curacies under 2 & 3 Vict. c. 49, s. 2 (see further, Phillimore, *Eccl. Law*, i. 243, 244).

The term "perpetual curate," as the designation of an incumbent other than a rector, has largely fallen into disuse since the passing, in 1868, of the Act 31 & 32 Vict. c. 117, which provided (sec. 2) that the incumbent of the church of every parish or new parish for ecclesiastical purposes, not being a rector, who is authorised to publish banns of matrimony in such church, and to solemnise therein marriages, churchings, and baptisms, and entitled for his own benefit to the entire fees arising from such offices, should, from the passing of the Act, for the purpose of style and designation, but not for any other purpose, be deemed and styled the vicar of such church and parish, and his benefice a vicarage.

See also RECTOR; VICAR; ECCLESIASTICAL COMMISSIONERS; ECCLESIASTICAL CORPORATIONS.

[*Authorities.*—Lind. *Prov.*; Gibs. *Codex*; Phillimore, *Eccl. Law*, 2nd ed.; Cripps, *Laws of the Church and Clergy*.]

Perpetual Injunction.—See INJUNCTION.

Perpetuating (Perpetuation of) Testimony.—

When Action will Lie.—Any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing any such right or claim (R. S. C., 1883, Order 37, r. 35, taken, with r. 36 of the same order, from 5 & 6 Vict. c. 69, repealed as to England by 46 & 47 Vict. c. 49, s. 3).

It is essential that an action should be commenced, since without such action no order can be made (Order 37, r. 37).

Former Practice.—Prior to the Judicature Acts, the jurisdiction was exercised upon bill brought in the Court of Chancery. Such bills were obviously indispensable for the purposes of public justice, as it might be utterly impossible for a party to bring his rights presently to a judicial decision; and unless, in the intermediate time, he might perpetuate the proofs of these rights, they might be lost without any default on his side (Story's *Equity Jurisprudence*, s. 1505).

The jurisdiction of the Court was exercised with great jealousy. "The jurisdiction which Courts of equity exercise to perpetuate testimony is open to grave objections: first, it leads to a trial on written depositions, which is much less favourable to the cause of truth than the *vivâ-voce* examination of witnesses. But what is still more important, inasmuch as these written depositions can never be used until after the death of the witnesses, and are not indeed published until after the death of the witnesses, it follows, whatever perjury may have been committed in these depositions, it must necessarily go unpunished. The testimony therefore has this infirmity, that it is not given under the sanction of those penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that Courts of equity do not entertain bills to perpetuate testimony generally for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice.

"If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained. But if the party who files the bill can by no means bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or when he himself is in possession), then Courts of equity will entertain such a suit; for, otherwise, the only testimony which could support the plaintiff's title might be lost by the death of his witnesses" (*per* Sir John Leach, *Angell v. Angell*, 1882, 1 Sim. & St. 83; 57 E. R. 33; 34 R. R. 149).

Modern Practice.—Under the present practice an action to perpetuate testimony is commenced by writ, and the statement of claim must allege the plaintiff's and the defendant's supposed interests, that the matter cannot be made the subject of immediate judicial investigation, that the evidence of the witnesses whose evidence it is proposed to take is material, and may be lost if not perpetuated, and must claim leave to examine such witnesses to the end that their testimony may be preserved and perpetuated.

As to the distinction between an action to perpetuate testimony and an action for discovery, see *Ellice v. Roupell*, 1863, 32 Beav. 308; 55 E. R. 121.

Discretion of Court.—Rule 35 of Order 37 does not compel the Court to make an order in favour of the plaintiff in every action which may fall within the terms of the rule. The Court has a discretion as to making such an order, and is entitled to consider all the circumstances of the case (*West v. Lord Sackville*, [1903] 2 Ch. 378).

Where an action can be brought under the Legitimacy Declaration Act, 1858, 21 & 22 Vict. c. 93, to establish the plaintiff's legitimacy, the Court will not, in the exercise of its discretion, make an order for the examination of witnesses in an action to perpetuate testimony (*West v. Lord Sackville*, *ubi supra*).

Where a question was raised during the lifetime of a divorced lunatic as to the legitimacy of one of his children, it was held that the proper course to adopt was for the Court to make a settlement of some of the lunatic's property on his children, and for the legitimate children to raise the question of the right of the alleged illegitimate child to participate, and then to bring an action to perpetuate testimony (*In re Stoer*, 1884, 9 P. D. 120).

Where Attorney-General should be made a Defendant.—In all actions to perpetuate testimony touching any honour, title, dignity, or office, or any other matter or thing in which the Crown may have any estate or interest, the Attorney-General may be made a defendant, and in all proceedings in which the depositions taken in any such action, in which the Attorney-General was so made a defendant, may be offered in evidence, such depositions are admissible, notwithstanding any objection to such depositions upon the ground that the Crown was not a party to the action in which such depositions were taken (Order 37, r. 36).

Action not to be set down for Trial.—An action to perpetuate testimony cannot be set down for trial (Order 37, r. 38). Under the old practice, if the suit was set down the bill was dismissed with costs, but without prejudice to the plaintiff using the evidence (*Hall v. Hoddesdon*, 1723, 2 P. Wms. 162; 24 E. R. 683; *Anon.*, 1734, 2 Ves. Sen. 498; 28 E. R. 319; *Ellice v. Roupell*, 1863, 32 Beav. 308; 55 E. R. 121).

Procedure, where Plaintiff in Default.—An application to dismiss an

action to perpetuate testimony for want of prosecution is irregular. The proper application is that the plaintiff do proceed within a given time, or pay the defendant his costs (*Wright v. Tatham*, 1828, 2 Sim. 459; 57 E. R. 859; *Beavan v. Carpenter*, 1842, 11 Sim. 22; 59 E. R. 781).

Procedure, where Defendant in Default.—If the defendant makes default in delivery of defence, the plaintiff is entitled to an order that the action may proceed notwithstanding such default, and that he may be at liberty to examine the witnesses as if the pleadings were closed (*Coveny v. Athill*, 1762, Dick. 355; 21 E. R. 306; *Lancaster v. Lancaster*, 1834, 6 Sim. 439; 58 E. R. 659; *Marquess of Bute v. James*, 1886, 33 Ch. D. 157).

Evidence, how Taken.—The evidence is usually taken before one of the examiners of the Court (*Marquess of Bute v. James*, *ubi supra*). The defendant as well as the plaintiff is entitled to examine witnesses under the order (*Earl of Abergavenny v. Powell*, 1816, 1 Mer. 434; 35 E. R. 733; *Skrine v. Powell*, 1845, 15 Sim. 81; 60 E. R. 527). The evidence of witnesses abroad may be taken on commission under the Evidence by Commission Acts, 1859, 22 Vict. c. 20, and 1885, 48 & 49 Vict. c. 74 (*Campbell v. A.-G.*, 1867, L. R. 2 Ch. 571).

Evidence, when Available—Publication of Testimony.—The evidence, having been taken, is filed. An order may be obtained for the evidence of any witness to be used after the death of the witness (*Barnsdale v. Lowe*, 1831, 2 R. & M. 142; 39 E. R. 348; *Morrison v. Arnold*, 1817, 19 Ves. 670; 34 E. R. 664); or in case of incapacity to travel through sickness, etc. (*Morrison v. Arnold*, 1817, 19 Ves. 670; 34 E. R. 664; *Biddulph v. Lord Camoys*, 1855, 20 Beav. 402; 52 E. R. 658).

Depositions which have been taken in a suit to perpetuate testimony instituted by a predecessor in title of a party to an action are not admissible as evidence of admissions made by him, unless they are proved to have been adopted and used by him. It is not enough that when produced from the Record Office the depositions are found to be unsealed (*Evans v. Merthyr Tydvil Urban Council*, [1899] Ch. 241).

For orders directing the publication of testimony in old suits, see *Duke of Hamilton v. Meynal*, 1754, Dick. 758; 21 E. R. 477; *Vane v. Vane*, 1876, 24 W. R. 565; *Moggridge v. Hall*, 1879, 13 Ch. D. 380.

Forms.—For form of application, see Daniell's *Chancery Forms*, p. 808; for forms of orders, see Seton, p. 101.

Costs.—As to costs in an action to perpetuate testimony, see Morgan & Wurtzburg, pp. 215, 216.

[*Authorities.*—See Daniell's *Chancery Practice*, 7th ed., 1901, pp. 1271-1274; Daniell's *Chancery Forms*, 5th ed., 1901, pp. 807, 808; Mitford on *Pleading*, 5th ed., 1847, pp. 62, 63; Seton's *Judgments and Orders*, 6th ed., 1901, pp. 101, 107, 108; Story's *Equity Jurisprudence*, 2nd English ed., ss. 1505-1512; Taylor on *Evidence*, 10th ed., 1906, pp. 386, 387].

Perpetuity; Perpetuities, Rule against.—The rule against perpetuities makes void every estate or interest which is limited by way of executory devise, shifting use or declaration of trust (express or constructive), to arise at some future time, either at law or in equity, in any real or personal property, and is not such as must necessarily vest (if at all) within twenty-one years after the death of some person, or the last survivor of some persons specified in the instrument containing the limitation and living when the instrument

first came into operation, or if no such person be specified, within twenty-one years from the time when the instrument first came into operation; provided that, if at the time when the instrument first comes into operation or the period so defined comes to an end, there be a child *en ventre sa mère*, who would if born be entitled under some limitation contained in the instrument, such child, if afterwards born alive, may for the purposes of taking some benefit under such limitation be considered as actually living at the above-mentioned time (see *Cadell v. Palmer*, 1833, 7 Bl. N. S. 202; *Palmer v. Holford*, 1828, 4 Russ. 403; *Abbiss v. Burney*, 1881, 17 Ch. D. 211; *London and South-Western Rly. Co. v. Gomm*, 1882, 24 Ch. D. 562; *Hancock v. Watson*, [1902] A. C. 14, 17, 18; *Re Wilmer's Trusts*, [1903] 2 Ch. 411; *Re Thompson*, [1906] 2 Ch. 199, 202; *Villar v. Gilbey*, [1907] A. C. 139; *Re Salaman*, [1908] 1 Ch. 4; *Fearne, C. R.* 429, 430, note (f), 502, 9th ed.; 1 Jarm. *Wills*, 219-223, 230, 1st ed., 213-216, 5th ed.; Gray, *Rule against Perpetuities*, s. 201, p. 166, 2nd ed.).

It has been already noticed (see CONTINGENT REMAINDERS, Vol. III. p. 515) that the simplicity of the early common law required every person intended to take an interest upon any transfer of property to be fully ascertained at the time of the transfer; and that this rule originally applied to gifts of lands in remainder as well as in possession, the early law only permitting the creation of future estates by way of vested remainder. The power of alienation therefore, which in this country was established from early times as an incident of ownership, could at first only be exercised in gifts or other transfers to living persons. The bounds so set to the exercise of the power of alienation were broken down—first, by the recognition of contingent remainders, which allowed of the gift of lands in remainder to unborn or unascertained persons, provided they should be born or ascertained when the particular estate came to an end; and secondly, by the rules applied in equity in enforcing the trusts imposed on persons, to whom property was confided with the intent that others should have the use of it. These rules allowed of the creation in equity, by will as well as by instrument operating *inter vivos*, of future estates or interests in the use of lands or chattels, of which the legal ownership was vested in trustees. As is well known, by the effect of the Statute of Uses, 27 Hen. VIII. c. 10, equitable estates in the use of land were turned into legal estates, and estates in land limited to arise at a future time by way of shifting use become cognisable by the Courts of law. About the same time, too, the devise of lands by will was authorised by statute (32 Hen. VIII. c. 1; 34 & 35 Hen. VIII. c. 5); and this brought before the Courts the creation of future interests in land by way of executory devise. In interpreting such dispositions the Courts departed from the strict rules governing the conveyance of lands *inter vivos*, and adopted the more liberal doctrine as to the effect of wills, which had been already applied at law in construing wills of land devisable by custom and in equity in enforcing uses or trusts declared by will of lands put in feoffment to uses. With the firm establishment under the modern system of equity, which may be said to date from the restoration of Charles II., of the rules relating to trusts, a fresh opportunity was afforded of limiting interests to arise in the future with regard to personal as well as real estate placed in the legal ownership of trustees (*Williams, Real Prop.* 292, 314-316, 13th ed.; 73, 74, 163-168, 237, 367, 388-390, 20th ed.).

When contingent remainder, shifting use, executory devise, and

declaration of trust all became available for the creation of future estates or interests which might be given to unborn or unascertained persons, and when it had been further established that executory interests, unlike contingent remainders, were indestructible (*Pells v. Brown*, Cro. Jac. 590; see *Fearne, C. R.* 418; *Gray, Rule against Perpetuities*, ss. 142 *et seq.* 159), the judges perceived that the liberty of alienation, which in the early days of Bracton had been decidedly favoured by the Courts (Bract. 17*a*, 45-47, 263*b*; Pollock and Maitland, *Hist. Eng. Law*, i. 313, ii. 25, 26; Williams, *Real Prop.*, 41-44, 13th ed.; 68-71, 91, 92, 20th ed.), might be exercised to its own destruction. For if it were permissible to defer the vesting of interests pending the happening of some contingency, such as the birth of issue intended to take beneficially, for an unlimited time, the power of effectually alienating the property bestowed might obviously be indefinitely postponed; as those in whom the ownership was vested in the meantime could only convey to others an estate or interest liable to be defeated on the happening of the contingency in which some executory interest was to arise. This consideration brought the creation of executory interests at law or in equity within a general principle of policy, which had been already invoked by the Courts, after the barring of estates tail by common recovery had become established, as the ground for holding void any device to restrain a tenant in tail from suffering a recovery (1 Rep. 84*a*, 88*a*, 131*b*; 6 Rep. 40*a*; 10 Rep. 42*b*; Cro. (2) 696-698). This was, that all contrivances shall be void which tend to create a perpetuity, or to place property for ever out of reach of the exercise of the power of alienation (see *Mary Portington's Case*, 10 Rep. 35*b*, 42*b*; *Duke of Norfolk's Case*, 1681, 3 Ch. Ca. 1, 31-37, 48-51; 22 E. R. 931; *S. C.*, 2 Swanst. 454, 460-468; 36 E. R. 690; *Scattergood v. Edge*, 1699, 12 Mod. 278, 287; *Stanley v. Leigh*, 1732, 2 P. W. 686, 688; 24 E. R. 917; *Stephens v. Stephens*, 1736, Ca. t. Talb.; 25 E. R. 751; *Thellusson v. Woodford*, 1798, 4 Ves. 227, 314; 11 Ves. 112, 133, 134, 146; 31 E. R. 117; 4 R. R. 205, 228, 232; 32 E. R. 1030; 8 R. R. 104; *Cadell v. Palmer*, 1832-3, 1 Cl. & Fin. 372, 412, 416; 6 E. R. 956; 36 R. R. 128).

Upon this principle it was considered that for an executory interest to be valid, the contingency in which it is to take effect must be such as must necessarily happen (if at all) within a limited space of time (*Fearne, C. R.* 430). It has already been shown how the exact definition of this limited space of time was gradually drawn by successive decisions extending over one hundred and fifty years—from *Howard v. Duke of Norfolk*, in 1681, allowing the duration of existing lives, to *Cadell v. Palmer* in 1833, permitting the further term of twenty-one years (CONTINGENT REMAINDERS, *ante*, Vol. III. p. 520).

Here we must point out that, although the rule against perpetuities appears to be founded on the principle that the right of alienation shall not be exercised to its own destruction in making such a disposition as shall render the property transferred inalienable in the hands of the transferee, the rule is none the less broken if an interest to arise on some contingency, which will not necessarily happen within the prescribed period, be given to an ascertained person capable of releasing the same (*Grey v. Montagu*, 1764, 2 Eden, 205; 28 E. R. 876; 3 Bro. P. C. 314; 1 E. R. 1341; *In re Brown and Sibley's Contract*, 1876, 3 Ch. D. 156; *London and South-Western Rly. Co. v. Gomm*, 1882, 20 Ch. D. 562, 573-575, 577, 581, 582, 586, 588). The reason of this is that the common law did not recognise either contingent remainders or

executory interests as proprietary rights. They were said to be possibilities only, capable indeed of being released for the benefit of the freeholder, if given to ascertained persons, but otherwise inalienable (Williams, *Real Prop.*, 279, 318, 13th ed.; 357, 392, 20th ed.; above, Vol. III. p. 523). Ascertained persons, to whom contingent interests had been limited, were not regarded by the law as owners invested with the right of alienation incident to ownership; those only who had the estate vested in them pending the fulfilment of the condition were the owners, and had the owner's right to alienate. It was their ownership that was disturbed, and their incidental right of alienation that was hindered, by the creation of indestructible executory interests; for while such interests existed, they, the only true owners, could not dispose of the property discharged from the possibilities attending the limitation of such interests. This appears to be the true reason why the limitation of executory interests is said to tend towards a perpetuity, and is void unless confined within the prescribed limits; and hence it is that an executory interest given to an ascertained person hinders the owner's alienation of the property as much as a similar interest limited to one unborn or otherwise unascertained (see *Duke of Marlborough v. Godolphin*, 1759, 1 Eden, 404, 415-419; 28 E. R. 741; 1 Sand. *Uses*, p. 196, 4th ed.; Lewis on *Perpetuity*, p. 164). It is true that there are certain judicial utterances in which this distinction has been obscured, and future or contingent interests have been pronounced to be without the mischief aimed at by the rule against perpetuities, if limited to an ascertained person capable of releasing the same (*Gilbertson v. Richards*, 4 H. & N. 277, 297, 298; 5 H. & N. 453, 459; *Avern v. Lloyd*, 1868, L. R. 5 Eq. 383; *Birmingham Canal Co. v. Cartwright*, 1879, 11 Ch. D. 421). The last case, however, was overruled in *L. & S.-W. Rly. Co. v. Gomm*, *ubi supra*, in which the doctrine expressed in these *dicta* was emphatically repudiated. *Avern v. Lloyd* has also been expressly overruled (*In re Hargreaves*, 1890, 43 Ch. D. 401).

The weight of authority is now clearly in favour of the proposition that an executory or contingent interest, which transgresses the rule against perpetuities in the remoteness of the event in which it is to arise, is void, as well when limited to an ascertained as to an unascertained person (Williams on *Settlements*, 30-33; Gray, *Rule against Perpetuities*, ch. vii. 2nd ed.).

The rule against perpetuities applies to dispositions of personal as well as real estate, whether made by instrument operating *inter vivos* or by will, and whether intended to take effect at law or in equity. The contingency, in which a future interest is to arise, is required to be such as must necessarily be fulfilled (if at all) within the time allowed by the rule; otherwise the limitation of the interest is altogether void *ab initio*. If it be possible, when the instrument containing an executory limitation first takes effect, for the event, in which the interest given is to arise, to happen after the time allowed by the rule, the limitation is not made good, in case the event should in fact happen within the permitted period. Thus a gift by way of shifting use or executory devise or bequest to the first son of A., a bachelor, who shall attain the age of twenty-four years, is void for remoteness; and though A.'s first son should attain twenty-four in A.'s lifetime, he would take nothing under such a limitation. And limitations contravening the rule are not construed as conferring interests valid for the period allowed by the rule, and void only as to the time for which this period has been exceeded;

they are treated as wholly void (*See v. Audley*, 1787, 1 Cox, 324, 325; 29 E. R. 1186; 1 R. R. 46; *Leake v. Robinson*, 1817, 2 Mer. 363; 35 E. R. 979; 16 R. R. 168; *Re Wood*, [1894] 3 Ch. 381; *Hancock v. Watson*, [1902] A. C. 14, 17, 18; 1 Jarm. *Wills*, 231-233, 1st ed.; 228, 229, 5th ed.). In limiting an interest subject to the rule, any number of existing lives may be taken, and they need not be the lives of persons entitled, or to become entitled under the instrument of disposition (*Thellusson v. Woodford*, *ubi supra*). But the persons selected must be ascertainable, or reasonably ascertainable. Thus where a testatrix specified the period of twenty-one years from the death of the last survivor of all persons who should be living at her death, the gift was held to be void for uncertainty (*Re Moore*, [1901] 1 Ch. 936). The term of twenty-one years which is allowed after the expiration of the last of any specified lives is an absolute term, and may be taken independently of the minority of any person beneficially interested; but the further period of gestation is only given in cases where gestation actually exists with regard to some child who, if born, would be entitled (*Cadell v. Palmer*, *ubi supra*; *Re Wilmer's Trusts*, [1903] 2 Ch. 411). The permitted period is calculated from the time when the instrument containing the limitation first takes effect, that is to say, in the case of a deed from the date of its execution, but in that of a will from the testator's death. The nature of a will being such that it is only to take effect on death, there is imputed to a testator, in construing a will, knowledge of the circumstances existing at the time of his death. In consequence of this, executory bequests which would be void, if the testator had died immediately after making his will, may become valid through circumstances subsequently happening in his lifetime. Thus a bequest to the first son of A. who shall attain twenty-four, which, as we have seen, is void if A. has no son when the instrument takes effect, will be valid if A. die, leaving a son, during the testator's lifetime; for in such case the bequest must take effect, if at all, within the compass of a life in being at the testator's death, that is, the son's life. The bequest would also take effect if at the testator's death a son of A. had attained twenty-four, though A. were living (1 Jarm. *Wills*, 216, 217, 5th ed.; *Picken v. Matthews*, 1879, 10 Ch. D. 264; and see *Re Thompson*, [1906] 2 Ch. 199).

"Where a gift is made to a class of persons, the whole class must be ascertained within the period limited, otherwise the whole gift will be void for remoteness. It is not enough that the minimum shares of some of the class are ascertained within the period. The share that each member of the class takes must be fixed and ascertained; and the Court cannot sever the minimum share of any member of the class from the rest of his share, holding the gift good as to the minimum share, and void beyond it. The entire gift fails if the uncertainty as to the amount of the several shares may exceed the limit fixed for the avoidance of perpetuities" (Williams on *Settlements*, 33, 34, citing *Smith v. Smith*, 1870, L. R. 5 Ch. 342; *Hale v. Hale*, 1876, 3 Ch. D. 643; *Bentwick v. Portland*, 1878, 7 Ch. D. 693; see also *Pearks v. Moseley*, 1880, 5 App. Cas. 714; *Re Bence*, [1891] 3 Ch. 242, 248; 1 Jarm. *Wills*, 226 *et seq.*, 5th ed.).

The rule against perpetuities only affects dispositions creating an interest in property; it has no application to contracts as regards the time for the performance of any duty thereby undertaken. A covenant, therefore, to do any act, as to pay money, is not avoided by reason that

the time of performance may not arise within the period allowed by the rule (*Walsh v. Secretary of State for India*, 1863, 10 H. L. C. 367; 11 E. R. 1068; *Witham v. Vane*, Appendix to Challis on *Real Property*). If, however, the contract create an equitable interest in property, it is a disposition affected by the rule; and the interest, which it purports to give, will be void, unless it must necessarily arise within the prescribed limits. This was established in the leading case of *L. & S.-W. Rly. Co. v. Gomm*, 1882, 20 Ch. D. 562, in which the Court of Appeal refused specific performance of a covenant by a tenant in fee simple of land purporting to give to a corporation, their successors or assigns, the right of purchasing the land at a fixed price at any time thereafter. The Court so decided on the ground that in equity a right of pre-emption is an interest in the land to be purchased, and the interest intended to be conferred by the covenant was void for want of conformity with the rule against perpetuities. The rule thus laid down has been extended to the case of a contract contained in a lease of land for a term exceeding twenty-one years, and giving to the lessee, his executors, administrators, or assigns, the option of purchasing the land from the lessor, his heirs or assigns, at any time during the term; and the Courts have refused to order the specific performance of such a contract at suit of the lessee's assign against the lessor's assign (*Woodall v. Clifton*, [1905] 2 Ch. 257; *Worthing Corporation v. Heather*, [1906] 2 Ch. 532; see also articles by the writer in 42 Sol. J. 628, 650; 49 Sol. J. 547). In the last-mentioned case it was further decided by Warrington, J., that such a contract is void only as regards any executory interest in property, which is limited to arise thereunder in equity, but is not such as must necessarily vest within the period allowed by the rule against perpetuities; and that, although the Court will not enforce the contract specifically, so as to give validity to such an interest in property, the Court will nevertheless enforce the contract at law by awarding damages, at suit of the lessee's assign against the lessor's assign, for breach of the obligation to give effect to such an interest. An appeal was entered against this decision, but was withdrawn on the case being compromised. The writer has endeavoured to show elsewhere that in this respect the learned judge's decision cannot be supported, and he respectfully maintains that, if it be against the policy of the law to enforce such an obligation specifically (because the *enforced* performance of the obligation would produce a result prohibited by the rule against perpetuities), it must also be against the policy of the law to constrain the contractor to perform the obligation on pain of being liable in damages if he do not fulfil the duty so created (see 51 Sol. J. 649, 669).

Here we may note that covenants made by a tenant in fee simple with some adjoining landowner, and imposing some restriction on the use of the covenantor's land—as not to build thereon—are not considered to be affected by the rule against perpetuities, by reason that in equity they impose a perpetual burden on the covenantor's land. They are regarded as conferring an immediate interest in equity in the nature of an easement (Knight-Bruce, V.-C., *Ex parte Ralph*, 1845, De G. 219, 225; Jessel, M.R., *L. & S.-W. Rly. Co. v. Gomm*, 1882, 20 Ch. D. 583; *Mackenzie v. Childers*, 1890, 43 Ch. D. 265, 279; *Formby v. Barker*, [1903] 2 Ch. 539, 551-553). If, however, the covenant did not impose an immediate restriction on the land, but sought to impose a restriction to commence at a time beyond the limits allowed by the rule against perpetuities, it seems that it would then be obnoxious to the rule, and

therefore void. An exception to the doctrine that contracts creating an interest in property must observe the limits of the rule against perpetuities, appears to exist in the case of covenants to renew a lease, either perpetually or for certain terms (Jessel, M.R., *L. & S.-W. Rly. Co. v. Gomm*, 1882, 20 Ch. D. 579; Challis, *Real Property*, 173, 174, 2nd ed., citing *Ross v. Worsop*, 1 Bro. P. C. 281; 1 E. R. 568; *Pendred v. Griffith*, 1 Bro. P. C. 314; 1 E. R. 590; *Sweet v. Anderson*, 1772, 2 Bro. P. C. 256; 1 E. R. 927; see 42 Sol. J. 630).

An exception to the rule against perpetuities is allowed in the case of executory limitations in defeasance of or immediately preceded by an estate tail. Such dispositions are allowed to be good, notwithstanding that the limits prescribed by the rule are necessarily exceeded, on the ground that, as such limitations are not indestructible, the law permitting them to be barred formerly by recovery and now by disentailing deed, they are not within the mischief which the rule seeks to avert (Fearne, *C. R.* 423-428, 567, note, 9th ed.; *Heasman v. Pearce*, 1871, L. R. 7 Ch. 275; *Millbank v. Vane*, [1893] 3 Ch. 79). It is submitted that for this reason the rule in *Whitby v. Mitchell* (1890, 44 Ch. D. 85; see above, Vol. III. p. 522) making void every limitation by way of contingent remainder, after a life estate to an unborn person, to such unborn person's child, does not apply to such limitations in remainder expectant on the determination of an estate tail.

The rule against perpetuities as applied to dispositions by way of shifting use, executory devise, or declaration of trust of personalty, contains no such restriction as was imposed in *Whitby v. Mitchell*, (above, Vol. III. p. 522), forbidding a gift of land to the child of an unborn person by way of a legal remainder after a life estate given to the unborn parent. It has been adjudged over and over again that executory limitations in favour of a living person's descendants or issue, in whatever degree, are good, if only the interests conferred on such descendants or issue must vest within the time allowed by the rule against perpetuities (*Routledge v. Dorril*, 1794, 2 Ves. Jun. 357, 362; 30 E. R. 671; 2 R. R. 250; *Thellusson v. Woodford*, 1798, 4 Ves. 227; 31 E. R. 117; 4 R. R. 205; 11 Ves. 112; 32 E. R. 1030; 8 R. R. 104; *Re Bowles*, [1902] 2 Ch. 650). In *Thellusson v. Woodford*, *ubi supra*, the gift held to be valid was to the eldest male lineal descendant, living at the expiration of the lives specified, of the testator's son. And personalty may well be settled in trust for a bachelor for life, then for his first son for life, and afterwards for the son's children to be born within twenty-one years after the bachelor's death (*Routledge v. Dorril*; *Re Bowles*, *ubi sup.*) It is thus perfectly clear that the rule governing the creation by the above-mentioned means of executory interests at law or in equity is unclouded by any such absurd condition as that there cannot be a possibility on a possibility, or that the possible children of unborn children are such as the law will not expect (see above, Vol. III. pp. 518, 521). And further, it does not appear that any such condition is attached to the limitation of a legal contingent remainder expectant on the determination of a vested estate. The earliest instance of a good contingent remainder is a limitation to one for life, remainder to the heir of J. S., a living person (above, Vol. III., p. 515). Here it is obviously possible that J. S. may be a bachelor when the limitation is made, and may die, leaving a grandson or even a great-grandson as his heir, in the lifetime of the tenant for life. It appears, therefore, that there is no general principle of law whereby the children of the unborn are regarded as incapable of taking

under a disposition of property; and that the rule in *Whitby v. Mitchell* (44 Ch. D. 85; see above, Vol. III., pp. 519-522) making void a gift of land to the child of an unborn person, if made by way of remainder after a life estate limited to the unborn parent, is confined to the particular instance so specified. It is, however, a question at present undecided, whether the limitation by way of contingent remainder of trust or equitable estates in land is subject to the precise rule laid down in *Whitby v. Mitchell* as well as to the rule against perpetuities (see above, Vol. III., p. 523; Williams on *Real Property*, 405, note (h), 20th ed.).

The effect of the avoidance of dispositions transgressing the rule against perpetuities is that, if such dispositions are intended to abridge or defeat any prior limitations, those limitations will remain unaffected, and will confer unabridged or indefeasible interests accordingly (*In re Brown and Sibley's Contract*, 1876, 3 Ch. D. 156). And, as a rule, all limitations ulterior to or expectant on any limitation void for the remoteness are also void (*Proctor v. Bishop of Bath and Wells*, 1794, 2 H. Black. 358; 1 Jarm. *Wills*, 253-255, 5th ed.; see also *Re Mortimer*, [1905] 2 Ch. 502, but note that in this case the attention of the Court does not appear to have been called to the fact that the ultimate limitation was a vested remainder; and see Gray, *Rule against Perpetuities*, ss. 251 *et seq.*, 2nd ed.; 23 L. Q. R. 127). It is obvious that if an executory interest be given in some event, which is too remote, an interest limited to arise in case the former interest fail to take effect must be equally void for remoteness. If, however, there be a limitation void for remoteness, followed by a further limitation to take effect in one of several alternative events, and one of such events falls within the rule against perpetuities, although the others transgress it, the further limitation will not be void if the event conforming with the rule be that which happens (*Longhead v. Phelps*, 1770, 2 W. Black. 704; *Miles v. Harford*, 12 Ch. D. 691; 1 Jarm. *Wills*, 255, 259, 5th ed.). Thus if a bequest be made on trust for A. for life and after his death for all his children who shall attain twenty-five, and if A. shall not have any such children for B., and A. survive the testator but have no child of twenty-five at the testator's death, the bequest in favour of A.'s children is void, and so is that in favour of B. (*Hancock v. Watson*, [1902] A. C. 14). But if in the same circumstances the bequest were in trust for A. for life, and after his death for his children who should attain twenty-five, and if he should have no child, or if no child of his should attain twenty-five, for B., then the gift over in B.'s favour might take effect if A. were to die without having had any child, though it would fail if A. had a child, but no child of his attained twenty-five.

The rule against perpetuities was originally formulated with respect to executory devises of chattels real (*Duke of Norfolk's Case*, 1681, 3 Ch. Ca. 1; 22 E. R. 931; Gray, *Rule against Perpetuities*, ss. 148 *et seq.*, 160, 169); it was applied to limitations of land by way of shifting use (*Lloyd v. Carew*, Shower, 137; Co. Litt. 327a, n. II. (1)); to executory bequests of chattels personal (*Jee v. Audley*, 1787, 1 Cox, 324; 29 E. R. 1186; *Leake v. Robinson*, 1817, 2 Mer. 363; 35 E. R. 979; 16 R. R. 168), and to settlements of personalty made by declaration of trust *inter vivos* (*Routledge v. Dorril*, 1798, 2 Ves. Jun. 357; 30 E. R. 671; 2 R. R. 250; *Re Bowles*, [1902] 2 Ch. 650); it was stated in its ultimate form in connection with executory devises of freehold land (*Cadell v. Palmer*, 1833, 7 Bligh, N. S. 202; 5 E. R. 745; 36 R. R. 128); it appears to govern executory devises of copyholds (1 Wat. Cop. 210; Davidson,

Prec. Conv., vol. iv., pp. 82, 83*n.*, 4th ed.; Gray, *Perpetuities*, s. 318); and it extends to the limitation by way of declaration of trust expressed or implied in a deed, writing, or will of equitable estates or interests, to arise at some future time, in land, including the limitation so made of contingent remainders of equitable estates (*Blagrove v. Hancock*, 1848, 16 Sim. 371; 60 E. R. 917; *Abbiss v. Burney*, 1881, 17 Ch. D. 222; 3 Davidson, *Prec. Conv.*, 340, 3rd ed.; *L. & S.-W. Rly. Co. v. Gomm*, 1882, 20 Ch. D. 583). It will be observed that all these modes of assurance are such as were unknown to the common law, except indeed the bequest of chattels; and even with regard to this, *executory* bequests of terms of years or other chattels appear to have been unknown to the early law (see Gray, *Perpetuities*, ss. 80, 81, 148-152; Williams, *Pers. Prop.*, 2, 356-359, 16th ed.). The Real Property Commissioners of 1832 in their Third Report (pp. 29, 31), after stating that it was a mistake to suppose that, at common law properly so called, there was any rule against perpetuities, drew attention to the fact that the modern doctrine limiting the extent of perpetuities had arisen with reference to shifting uses, executory devises and executory trusts; and they said that it was owing to this circumstance that the doctrine had been so little discussed with reference to estates or interests arising by other means. As to these, they instanced remainders as not being included among the future interests, which are restrained in their limits by the rules of law relating to perpetuities. And with respect to such other interests as might at common law commence *in futuro*, namely, rights of entry for condition broken, grants of rent-charges *profits à prendre* or easements, and terms of years, or, more strictly speaking, the *interesse termini*, they stated that the ancient common law did not restrain the creation of these interests to a given period, but left indefinite the time within which such interests might arise; and they said that they knew of no bounds, fixed by the common law, within which interests of this kind were restrained. This opinion appears to be unquestionably correct. The learned Commissioners, however, went on to say that the last-mentioned interests were clearly within the policy which the law had adopted with respect to perpetuities. Since this report was penned the policy in question, which we have ventured to define as a general principle, that the right of alienation shall not be exercised to its own destruction, has extended the rule against perpetuities so as to include some of the interests, which the Real Property Commissioners considered to remain outside its pale. Thus, the rule has been applied to legal estates in land limited by way of *second* or *successive* contingent remainder to take effect after the determination or failure of some prior contingent remainder for life expectant on a particular *vested* estate of freehold, such second or successive contingent remainder being held to be void unless it must necessarily vest (if at all) within the period allowed by the rule (*Re Frost*, 1890, 43 Ch. D. 246, followed in *Re Ashforth*, [1905] 1 Ch. 535; *Whitby v. Von Luedecke*, [1906] 1 Ch. 783; see *ante*, Vol. III. pp. 522, 523, *s.v.* CONTINGENT REMAINDERS). And the opinion has been judicially expressed that a common-law condition of re-entry annexed to a grant of land in fee is invalid unless the event in which the power of entry is to arise, must occur within the time allowed by the rule (*North, J., Dunn v. Flood*, 1883, 25 Ch. D. 629; Baggallay, L.J., *s.c.* on appeal, [1885] 28 Ch. D. 586, 592; *Re Hollis's Hospital and Hague*, Byrne, J., 1899, 2 Ch. 540). This last opinion is criticised by the writer in 1 Wms. V. & P. 600 and *n. (k)*. And it may be observed that, by the common

law, if an estate be given to a man and his heirs subject to the performance by him and them of some condition subsequent, a right is *implied* for the donor and his heirs to re-enter on breach of the condition (Litt. ss. 328, 329, 331). It does not appear that in this respect the law has been altered. But if common law conditions of re-entry expressly annexed to a grant of land in fee are subject to the rule against perpetuities, within what time is the implied right of re-entry to be exercisable?

As to the granting of a lease for years to commence at a future time, in *Smith v. Day*, 1837, 2 M. & W. 684, it appeared that by an indenture dated August 30, 1816, a lease was granted for a term of seventeen years to commence from September 29, 1869, when an existing lease of the demised premises would expire. It was decided that the grantee under this lease obtained a mere *interesse termini* and not an assignment of the reversion expectant on the existing lease; but no suggestion made, either by the Court or the counsel engaged, that the grant was void. It seems therefore that the law was assumed to be as stated by the Real Property Commissioners, namely, that there is no limit to the time within which an *interesse termini* may be granted to commence. The writer is not aware of any authority or judicial opinion to the contrary. It was, however, suggested by Mr. Sanders (1 Sand. *Uses*, 197, 199, 4th ed.) that by analogy to the modern doctrine of perpetuities the *interesse termini* would be held to be confined to the time allowed in cases of executory devises and springing uses. Mr. Lewis (*Perpetuity*, 600, 609, 614) also argued that limitations of the *interesse termini* to commence *in futuro* have a tendency to remoteness and should be confined within the period allowed by the Rule against Perpetuities. Mr. Sanders and Mr. Lewis (*ubi sup.*) maintained the same view with respect to rents, *profits à prendre* and easements to commence *in futuro*, and also as to common-law rights of entry for condition broken; and in all these respects they are followed by Mr. Gray (*Perpetuities*, ss. 299-303, 314, 316, 319). These learned writers, however, admit, as the Real Property Commissioners stated, that the old common law set no limit to the creation of such future interests (1 Sand. *Uses*, 198, 199, 4th ed.; Lewis on *Perpetuity*, 608; Gray, *Perpetuities*, *ubi sup.*, and sec. 123). Their opinions therefore do not go beyond that of the Real Property Commissioners in alleging that such interests are within the policy, which dictated the rule against perpetuities. And it remains to be seen whether the Courts will, in these instances, act on that policy and further enlarge the rule.

The reservation by a lease of a right of entry to the lessor or his representatives on breach of covenant or condition by the lessee is not affected by the rule against perpetuities, the lessor's reversion being a vested estate, of which the falling into possession would be simply accelerated should the right reserved arise (Gray, *Perp.*, s. 303). And it is maintained that a power of entry limited on the creation by way of use of a rent-charge in fee, and authorising the grantee, his heirs, and assigns in case of non-payment of the rent at any time to enter on the land charged, and hold the same till all arrears of the rent shall have been satisfied out of the profits, is also free from objection on the score of perpetuity, such power being considered to be no more than a part of the estate, which the granter has in his rent (*Haverhill v. Hare*, Cro. Jac. 510; 79 E. R. 435; Third Report of Real Prop. Commrs., 37; Sug. Gilb. *Uses*, 178, 179; Lewis, *Perp.*, 618; 1 Wms. V. & P. 598). But a power

reserved by way of shifting use for the grantee, his heirs or assigns, of a rent-charge in fee to enter on the land charged, in case of non-payment of the rent at any time, and to hold the same in fee, is void; for all future interests in land to arise under shifting uses are within the rule against perpetuities (Third Report of Real Prop. Commrs., 37; see 1 Wms. V. & P. 599-603).

The rule against perpetuities must, of course, be observed in the limitation of powers of appointment, which can only be created at law by means of the Statute of Uses, or by way of executory devise, or in equity by declaration of trust. No power of appointment is therefore valid which is limited to arise in an event which may happen beyond the period prescribed by the rule (*Marlborough v. Godolphin*, 1 Eden, 404; 28 E. R. 741; *Hale v. Pew*, 25 Beav. 335; 53 E. R. 665; *Sug. Pow.*, 31, 151, 8th ed.; and see 1 Wms. V. & P. 272), unless the power be so given that it may be extinguished by barring an estate tail. On this ground it has been determined that a collateral power of sale and exchange contained in a settlement of land with the usual limitations is valid, although its exercise be not expressly restrained within the limits of the rule against perpetuities (*Waring v. Coventry*, 1833, 1 Myl. & K. 249; 39 E. R. 675; 36 R. R. 318; *Biddle v. Perkins*, 1832, 4 Sim. 135; 58 E. R. 52; 33 R. R. 103; *Briggs v. Earl of Oxford*, 1852, 1 De G., M. & G. 363; 42 E. R. 592; *Sug. Pow.*, 848-851, 8th ed.; and see 1 Wms. V. & P. 273). The rule must also be regarded in the exercise of powers of appointment. Here a difference must be noted between general powers authorising an appointment to any one, and special powers only authorising an appointment amongst a limited class of persons, such as the children of some specified parents. In exercising the former, the period, within which any contingent interests appointed must arise, is calculated from the time when the instrument exercising the power first takes effect; and this is the case even though the power were limited to be exercisable by will only (*Sug. Pow.*, 394-396, 8th ed.; *Williams, Pers. Prop.*, 326-328, 11th ed.; 373-375, 16th ed.; *Rous v. Jackson*, 1887, 29 Ch. D. 521; *In re Flower*, 1886, 55 L. J. Ch. 200); see, however, *In re Powell's Trusts*, 39 L. J. Ch. 188, which was not followed in the two last-mentioned cases, but which Mr. Gray (*Perp.*, s. 526) maintains to be in accordance with principle. There is no doubt that to hold that, in the exercise of a power of appointment by will only, the period allowed for the creation of contingent interests commences from the death of the donee of the power, has the practical result of increasing the period, during which the property given may be tied up, by the life of the donee of the power). But in the case of special powers, the time allowed by the rule against perpetuities is reckoned from the date of the instrument creating the power, not from the time when the instrument exercising the power, takes effect. In exercising any special power, therefore, care must be taken that any estate or interest appointed would have been unobjectionable on the score of perpetuity if limited by the instrument which created the power (*Co. Litt.* 271*b*, *n.* (1), vii. 2; *Routledge v. Dorril*, 1794, 2 Ves. Jun. 357; 30 E. R. 671; 2 R. R. 250; *Sug. Pow.*, 396, 397, 8th ed.; *Williams on Settlements*, 43; *Whitby v. Mitchell*, *ubi supra*). But in exercising any such power, the appointor is considered to be cognisant of and to have regard to the state of the family or the facts of the case as existing at the time of exercising the power, or if the power were exercised by will at the appointor's death; and if any appointment so made confers upon the appointee an interest

which, having regard to such facts, must necessarily vest within the time allowed by the rule against perpetuities, as calculated from the date when the instrument creating the power took effect, the appointment will be valid; notwithstanding that if the exact words used in making the appointment had been inserted in the instrument creating the power, the limitation so made would have been void (see *Peard v. Kekewich*, 1852, 15 Beav. 166; 51 E. R. 500; *Wilkinson v. Duncan*, 1861, 30 Beav. 111; 54 E. R. 831; *Re Thompson*, [1906] 2 Ch. 199. It is submitted that the decision in *Re Wright*, *ibid.* 288, is incorrect as regards the gift payable to F. W. Wright at the age of twenty-five, the rule above stated not having been brought to the notice of the learned judge; see 23 L. Q. R. 9). Here we may observe that a power of appointment amongst a limited class of persons, some of whom might be born beyond the prescribed period, is not void, if authorising an exclusive appointment, by reason only that it is not expressly confined to those only of the class who shall be born within that period. Thus a power for a given person to appoint to all or any of his issue is not void; but it can only be well exercised in favour of such of his issue as shall be born within the time allowed by the rule against perpetuities, reckoning from the date when the instrument which created the power took effect (*Hockley v. Mawbey*, 1790, 1 Ves. Jun. 143, 150; 30 E. R. 271; 1 R. R. 93; *Routledge v. Dorril*, *ubi supra*; *Griffith v. Pownall*, 1843, 13 Sim. 393; 60 E. R. 152; 60 R. R. 366; *Attenborough v. Attenborough*, 1855, 1 Kay & J. 296; *Sug. Pow.*, 397, 8th ed.). Limitations in default of appointment under a power which is void for remoteness are not void, unless they themselves break the rule against perpetuities (*In re Abbott*, [1893] 1 Ch. 54).

The rule against perpetuities does not prohibit the alienation of land to or for the benefit of a corporation into mortmain, or for charitable purposes, though perpetual, and such alienation may be made under the conditions imposed by the Mortmain and Charitable Uses Acts, 1888 and 1891, replacing the earlier statutes. If, however, the gift to a corporation or for charitable purposes be not immediate, but be expressed to take effect on the happening of some contingency at a future time, the rule against perpetuities will apply, and the gift will be void unless the contingency must necessarily happen (if at all) within the period thereby allowed (*Commissioners of Charitable Donations v. De Clifford*, 1841, 1 Dr. & War. 245, 254; 58 R. R. 259; *Chamberlayne v. Brockett*, 1873, L. R. 8 Ch. 206, 211; *In re Roberts*, 1882, 19 Ch. D. 520; *In re White's Trusts*, 1886, 33 Ch. D. 449, 453; *Re Swain*, [1905] 1 Ch. 669, 676). As property may be lawfully given to be for ever devoted to charitable purposes, it has been held that property may be well limited to one charity subject to a gift over in favour of another charity, to arise in some event which may take place beyond the period allowed by the rule against perpetuities (*Christ's Hospital v. Grainger*, 1848, 1 Mac. & G. 460; 41 E. R. 1343; *In re Tyler*, [1891] 3 Ch. 252). But if property be given for charitable purposes with a gift over on the happening of some future event, in favour of a private individual, the gift over, to be valid, must conform with the rule (*In re Bowen*, [1893] 2 Ch. 491).

The rule against perpetuities is subject to certain statutory modifications. First, executory limitations contained in instruments coming into operation after the year 1882 are subject to a further restriction imposed by the Conveyancing Act, 1882, Stat. 45 & 46 Vict. c. 39,

s. 10, in which it is enacted that, where there is a person entitled to lands for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue, who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect. Secondly, dispositions directing the accumulation of the income of any property are subject to statutory restrictions. Stat. 39 & 40 Geo. III. c. 98 (commonly called the *Thellusson Act*, having passed in consequence of the extraordinary will of Mr. Thellusson, held valid in *Thellusson v. Woodford*, *ubi supra*) forbids the accumulation of income for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor, settlor, deviser, or testator, or during the minority of any person living or in *ventre sa mère* at the death of the grantor, deviser, or testator, or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income directed so to be accumulated (see *Wilson v. Wilson*, 1851, 1 Sim. N. S. 288; 61 E. R. 111; *Re Cattell*, [1907] 1 Ch. 567). But the Act does not extend to any provision for payment of debts, or for raising portions for children (see *Halford v. Stains*, 1849, 16 Sim. 488, 496; 60 E. R. 963; *Bacon v. Proctor*, 1822, Turn. & R. 31; 37 E. R. 1005; 23 R. R. 177; *Bateman v. Hotchkin*, 1847, 10 Beav. 426; 50 E. R. 646; 76 R. R. 165; *Barrington v. Liddell*, 1852, 2 De G., M. & G. 480; 42 E. R. 958), or to any direction touching the produce of timber or wood. Nor does it apply to a trust to expend part of the income of a landed estate in maintaining the property in good repair (*Vines v. Raleigh*, [1891] 2 Ch. 13). Any direction to accumulate income, which may exceed the period thus allowed, is valid to the extent of the time allowed by the Act, but void so far as this time may be exceeded (see 1 Jarm. *Wills*, 275, 5th ed.; *In re Lady Rosslyn's Trust*, 1848, 16 Sim. 391; *Ralph v. Carrick*, 1877, 5 Ch. D. 984, 997, 998; *Re Travis*, [1900] 2 Ch. 541). And if the direction to accumulate should exceed the limits allowed by the rule against perpetuities, it will be void altogether, independently of the above Act (see *Southampton v. Hertford*, 1813, 2 Ves. & Bea. 54; 35 E. R. 239; 13 R. R. 18; *Ker v. Dungannon*, 1 Dr. & War. 509; *Curtis v. Lukin*, 1842, 5 Beav. 147; 49 E. R. 533; 59 R. R. 442; *Broughton v. James*, 1839, 1 Coll. 26; *Scarisbrick v. Skelmersdale*, 1850, 17 Sim. 187; 60 E. R. 1100; *Turvin v. Newcome*, 1856, 3 Kay & J. 16; 69 E. R. 1003). A trust for accumulation for the benefit of a charity may not exceed the limits imposed by the *Thellusson Act* (*Harbin v. Masterman*, 1871, L. R. 12 Eq. 559). By an Act of 1892 (Stat. 55 & 56 Vict. c. 58) the accumulation of income for the purchase of land is prohibited for any longer period than during the minority or respective minorities of any person or persons who, under the instrument directing accumulation, would, for the time being, if of full age, be entitled to receive the income so directed to be accumulated (see *Re Clutterbuck*, [1901] 2 Ch. 285; *Re Llanover*, [1903] 2 Ch. 330).

[*Authorities*.—*Fearne, Cont. Remrs.*; 1 Jarm. *Wills*; *Lewis on Perpetuity*; *Marsden on Perpetuity*; *Gray, Rule against Perpetuities*, 2nd ed., Boston, U.S.A., 1906.]

Per proc.—See PROCURATION.

Perquisitio.—Something gained or acquired by the holder of an office over and above the wages or salary attached to such office. *Perquisitio*, and its equivalent “purchase,” is also used in contradistinction to descent, or title derived from the ancestor; and the heir was said to take by “purchase” instead of by “descent,” to denote that he took his estate by virtue of the original grant to the ancestor and himself, and not by devolution of the estate on the ancestor's death.

In connection with copyholds, perquisites of the lord are those advantages and profits which accrue to him over and above the yearly profits and income, and the term is used to include fines, escheats, heriots, reliefs, wards, and the like.

Perquisition (*French Law*).—A word used to describe a search for a document among the private papers of any person, *e.g.* by a judicial official for a will, or by the police for incriminating documents among the private effects of an accused person.

Per quod consortium amisit.—See SEDUCTION.

Per quod servitium amisit.—See SEDUCTION.

Persia.—*Area.*—The Empire of Persia is bounded on the south by the Persian Gulf, on the west by the Turkish provinces of Armenia and Mesopotamia (see OTTOMAN DOMINIONS), on the north by the Russian provinces of Tartary and Caucasus (see RUSSIA) and the Caspian Sea, and on the east by Afghanistan and Beluchistan. The total area of the empire is 628,000 square miles, or about five times as large as the United Kingdom.

History.—The Persians were a very ancient Aryan people who founded an empire in the sixth century B.C. which overthrew Assyria. They became a conquering people under Cyrus, and established the “Laws of the Medes and Persians” over all Western Asia. At the period of its greatest ascendancy under Darius the empire covered nearly the whole of what is now Turkey in Asia (including Syria), besides most of modern Persia, Afghanistan, and Beluchistan. Under his son Xerxes the Persians invaded Greece, but their advance westward was stopped by Alexander the Great, who brought Persia under his sway. Later Persia formed part of the dominions of the Semitic Arabs, and the Persians became Mohammedans in religion. The Mongolians next became possessed of Persia, but on the death of Tamerlane Persia became independent, and once more famous, under the Sufi dynasty. Endless wars followed between the Turks and the Persians in the sixteenth and seventeenth centuries, Persia flourishing under Abbas the Great (1586-1628). For a short while in the eighteenth century under Nadir (1736-1747) the Persian frontiers were largely extended, but during the nineteenth century Turkey and Russia acquired large slices of the empire, and the eastern portion was formed into the States of Afghanistan and Beluchistan, and the present boundaries of the empire were fixed. Those boundaries now include only the eastern portions of the ancient Median and Babylonian empires.

British and Russian Relations.—In 1741 the trade to and from Persia through Russia was opened up by 24 Geo. II. c. 36 to the Russian Company (see RUSSIA). In 1836 the Shah issued a proclamation (*London Gazette*,

July 22, 1836, p. 1333) placing British trade on the same footing as Russian. In 1864 the Indo-European Telegraph line was established. On September 2, 1899, the Imperial Bank of Persia was incorporated by charter, and given the exclusive right of note issue and important mineral concessions.

By the Anglo-Russian Agreement of August 31, 1907 (Parl. Papers, 1907, cd. 3750), from a point in north-eastern Russia, covering Herat southward to the sea at Bander Abbas, a broad belt of the Persian borderland is included within the British sphere of influence, whilst the Russian sphere is largely extended towards the Persian Gulf. The Agreement also deals with present and future concessions, Persian revenues, and the several banks established in the country.

Constitution.—Until 1906 the form of Government was similar to that of Turkey, the Shah, as vice-regent of the Prophet, being an absolute monarch.

By the rescript of August 5, 1906, a constitution (*"Mashrutch"*) was conferred on the country, a national council (*"Mejliss"*) being established, to consist of and be elected by members of the reigning dynasty, clergy, chiefs, nobles, landowners, merchants, and tradesmen. By Ordinance of September 10, 1906, as amended by the Constitution of January 1, 1907 (*"the Nizamnameh"*), the number of the members of the National Council is 162 (raisable to 200). Members are elected for two years, are immune from prosecution, except with the knowledge of the Council, and meet annually. The sanction of the Council is necessary for all territorial changes, alienation of State property, the granting of concessions, contracting of loans, construction of roads and railways, and for the ratification of treaties, save where the interests of State require secrecy. There is to be a Senate of sixty members, of whom half are to be appointed as the Shah's representatives and half to be elected by the National Council, half of each to be from Teheran and half from the provinces.

The executive power is vested in a ministry of nearly thirty ministers, of whom only half a dozen are consulted on affairs of State. But a struggle is now (January 1908) going on in Persia, and constitutional government in the European sense cannot be said to be yet established.

For administrative purposes Persia is divided into thirty-three provinces, administered by governor-generals, who are directly responsible to the Central Government, and nominate the lieutenant-governors of their several districts. In each town there is a mayor or chief magistrate, and every parish or quarter of a town and every village has its chief. The functions of these officials are merely to collect the revenue, and they are either appointed by the lieutenant-governors or elected by the people. In the case of nomad tribes, these officials are represented by the chiefs of the tribes, who are responsible to the provincial governors.

Consular Jurisdiction.—With Persia there is no treaty which directly confers consular jurisdiction, but by Article XII. of the Treaty of March 4, 1857 (Hertslet's *State Papers*, vol. xlvii. p. 42), concluded on the termination of the Persian War, the most favoured nation treatment was obtained by Great Britain, who, like France and Russia, thereby enjoys both civil and criminal jurisdiction over her own subjects.

Existing Consular Court Jurisdiction.—The Persian Order in Council, 1889 (St. R. & O., Rev. 1904, vol. v., "Foreign Jurisdiction," p. 575), as

amended by the Persia (Judicial Fees) Order in Council, 1898 (*ibid.*, p. 688), and by the Persia (Regulations) Order in Council, 1901 (*ibid.*, p. 689), consolidates the whole of the previous orders. The Consul-General's Court for Persia sits at Teheran, and has no special judicial officer, the consul-general not being required to be a barrister, as in Turkey (see OTTOMAN DOMINIONS). In criminal cases the consul-general is unable to imprison for more than five years, with or without hard labour, and with or without a fine of not more than £500; but he can record sentence of death, and his inadequate power of punishment is corrected by his being enabled to send native Indian subjects for trial to Bombay, other British subjects to Malta, and persons who are natives of, and domiciled in, Cyprus, to that island. In other respects the Consul-General's Court and the Provincial Courts, from which appeals lie to the Consul-General's Court, have similar powers and constitutions to those of other fully organised Consular Courts (see article FOREIGN JURISDICTION). An appeal from the Consul-General's Court lies direct to His Majesty in Council, under Articles 230-2 of the 1889 Order (see PRIVY COUNCIL). The Persian Coast and Islands Orders in Council have all been consolidated by Order in Council of May 7, 1907 (St. R. & O., 1907, p. 243). The Consul-General and Political Resident in the Persian Gulf holds the Court, which is called the Consul-General's Court, and is assimilated in jurisdiction and organisation to the Courts of the Bombay Presidency. Indian, and not English, law is applied, and appeals lie to the High Court of Bombay.

King's Regulations.—His Majesty's Consul-General at Teheran has, under the Order of 1901, power to legislate for the government of British subjects in Persia on the subjects specified in the orders, and for enforcing treaty stipulations. Within the Persian coast and islands the Political Resident has similar powers under Article 55 of the 1907 Order.

Customary Powers of Consular Officers.—These which, as in other countries where Great Britain has extraterritorial jurisdiction, are not affected by the Foreign Jurisdiction Orders, are dealt with in the article CONSUL (*q.v.*). As stated in the article CONSULAR FEES (*q.v.*), consuls are empowered to take certain fees, which are now regulated by the Consular Fees (General) Order in Council, 1906 (St. R. & O., 1906, pp. 76-87).

Application of Imperial Acts.—By Order in Council of August 18, 1882 (St. R. & O., Rev. 1904, vol. xi., "Slave Trade," p. 68), the Treaty of March 2, 1882, with Persia for the suppression of the slave trade was declared to be an existing slave trade treaty within the meaning of the Slave Trade (East African Courts) Act, 1873, 36 & 37 Vict. c. 88. Persia is a party to the general Brussels Act, which has also been brought by Order in Council (*ibid.*, p. 1) within the Act of 1873. By Order in Council of April 30, 1877 (*ibid.*, p. 84), the shores of the Persian Gulf and the Persian Islands were declared to be territories within which any subject of His Majesty or of any allied Indian State committing any of the offences defined in secs. 367, 370, 371 of the Indian Penal Code was to be dealt with as if the same had been committed in British India, under the Slave Trade Act, 1876, 39 & 40 Vict. c. 46.

[See *The Statesman's Year-Book*; Hall's *Foreign Jurisdiction of the British Crown*.]

Person.—It is provided by sec. 2 of the Interpretation Act, 1889, 52 & 53 Vict. c. 63, that in the construction of every enactment

relating to an offence punishable on indictment or on summary conviction, the expression "person," whether contained in an Act passed before or after the commencement of the Act of 1889, shall, unless a contrary intention appears, include a body corporate; and by sec. 19, that in the Act of 1889, and in every Act passed subsequently thereto, the expression "person" shall, unless a contrary intention appears, include any body of persons, corporate or unincorporate. Subject to these provisions, the question whether the word "person" in a statute is to be interpreted as including a corporation depends upon the context and the object of the statute. *Prima facie*, it does include a corporation; but in its popular sense and ordinary use it does not, and statutes are often conceived according to the popular use of language; and whenever the object of the statute requires that the word shall be interpreted in its more or less extended sense, it must be construed accordingly (*per* Selborne, L.C., and Lord Blackburn, in *Pharmaceutical Society v. London, etc., Supply Association*, 1880, 5 App. Cas. 857). In *Boyd v. Croydon Rly. Co.*, 1838, 4 Bing. N. C. 669, where the special Act incorporating a railway company provided that no action should be brought against any person for anything done in pursuance of the Act, until after twenty-one days' notice to the intended defendant, it was held that the word "person" included the railway company; and a similar construction was adopted in *St. Helens Tramway Co. v. Wood*, 1891, 56 J. P. 71, where a tramway Act imposed a penalty on "any person" offending against its provisions. So a joint-stock company is a person within the meaning of sec. 11 of the Act of 54 Geo. III. c. 159 (*United Alkali Co. v. Simpson*, [1894] 2 Q. B. 116). On the other hand, it has been held that a corporation cannot sue for penalties as a common informer under a statute empowering the "person or persons" who shall inform and sue for the penalties to recover the same (*St. Leonard's, Shoreditch, v. Franklin*, 1878, 3 C. P. D. 377).

In *In re Jeffcock*, 1882, 51 L. J. Ch. 507, it was held that a power given to trustees to grant leases "to any person or persons they should think fit," authorised them to grant a lease to a limited company.

See AGGRIEVED; and Stroud, *Jud. Dict.*

Persona.—This word, in Latin, originally signified a mask, whence its use in the phrase *dramatis personæ*, but in Roman law it meant *homo cum statu*, that is to say, a human being viewed as clothed with legal rights and as capable of having, and becoming subject to, these. The word was also used in a more restricted sense with reference to the different relationships to which the same individual might in law subject himself, in which case such a one might be regarded as possessing several *personæ* or characters, as of husband, father, master, etc. So the *jus personarum* is that portion of the general law which deals with such relationships. The phrase *jus in personam*, again, was used in the later civil law to signify a mere right of action, as distinguished from such rights as of hypothec, which were called *jura in rem*.

As above stated, in its wider sense, *persona* meant *homo cum statu*, and status might either be *naturalis*, implying physical capacity, or *civilis*, involving *libertas*, *civitas*, and *familia*, and implying such qualities as rank, domicile, relationship, profession, etc. As to the latter, liberty was essential; wherefore slaves, strictly speaking, had no status. As to the former, the Romans regarded even the babe in the womb as for

some purposes a *persona*. Thus capital punishment was prohibited against pregnant women, and a woman bringing about abortion was guilty of murder. But for purposes of inheritance a child had to be born alive, in proof of which any sure sign was regarded by Justinian as sufficient. See PERSON.

Person Aggrieved.—See AGGRIEVED.

Persona designata.—Where a person is indicated in a statute or legal instrument not by name, but either by an official designation or as one of a class, a question sometimes arises whether he ceases to be the person so indicated on losing his official designation or his character as one of the class, or whether the intention was to single him out as a *persona designata*, that is, as an individual, the designation being merely a further description of him. *Designatio personæ* then, in general, means simply the singling out by description of a party to a deed or contract; or a person taking thereunder, such party or person being in turn called *persona designata*. When difficulty is found in ascertaining whether a person takes as *persona designata*, the maxim "*Designatio unius est exclusio alterius et expressum facit cessare tacitum*" is applicable; in other words, if one person is specified, another is excluded, on the principle that what is expressed makes what is only understood to give way. Thus where a testatrix created a trust in favour of all the nephews and nieces of her late husband living at the time of his death, except A. and B., as tenants in common, and two nephews who survived her husband had since died, it was held that the gift was to a class, and not to *personæ designatæ*, and that consequently there was no lapse, and the fund was divisible among those who survived (*Dimond v. Bostock*, 1875, L. R. 10 Ch. 358; cp. *In re Jackson, Shiers v. Ashworth*, 1883, 25 Ch. D. 162; *In re Stanhope's Trusts*, 1859, 27 Beav. 201; 54 E. R. 78). On the other hand, a gift of the residue "equally to and between all my children," following upon a bequest to "my nine children" was held to indicate *personæ designatæ*, so as to entitle the representatives of a child who died in the testator's lifetime to participate (*In re Stansfield, Stansfield v. Stansfield*, 1880, 15 Ch. D. 84). So, though in general a bequest to "children" will mean those within that description at the testator's death, even including one *en ventre sa mère*, if it is clear that only those in existence at the date of the instrument were intended, such intention will be effectuated (*Rogers v. Mutch*, 1878, 10 Ch. D. 25; *Pearce v. Carrington*, 1873, L. R. 8 Ch. 969; *Doe d. Clarke v. Clarke*, 1795, 2 Black. (H.) 399; *Sherer v. Bishop*, 1792, 4 Bro. C. C. 55; 29 E. R. 776; *Viner v. Francis*, 1789, 2 Cox, 190). The word "children," however, will not, *primâ facie*, include illegitimate children (*Megson v. Hindle*, 1880, 15 Ch. D. 198; *In re Wells's Estate*, 1868, L. R. 6 Eq. 599), and never future illegitimate children (*Pratt v. Mathew*, 1856, 22 Beav. 328; 52 E. R. 1134; *Beachcroft v. Beachcroft*, 1816, 1 Madd. 430; 16 R. R. 242); but an illegitimate child *in esse* may take under a gift to children as a class, if it clearly appears that such was the intention (*Holt v. Sindrey*, 1868, L. R. 7 Eq. 170). In the same way, where the intention is established, a woman though not lawfully married, may take under the designation "wife" (*Lepine v. Bean*, 1870, L. R. 10 Eq. 160; *In re Petts*, 1859, 27 Beav. 576; 54 E. R. 228; *Doe d. Gains v. Rouse*, 1848, 5 C. B. 422; *Giles v. Giles*, 1836, 1 Keen, 685; 48 E. R. 471; [see also *In re Wagstaff, Wagstaff v. Jalland*, [1908]

1 Ch. 162]). But if technical words are employed, they will receive their technical signification (*Roddy v. Fitzgerald*, 1857, 6 H. L. C. 823; 10 E. R. 1518; *Jesson v. Wright*, 1820, 2 Bli. 1; 4 E. R. 230; 21 R. R. 1); for example, the term "executors and administrators" will be construed strictly, and not as a *designatio personæ* for next-of-kin, and the term "beneficiary" will also receive its ordinary signification (see *Webb v. Sadler*, 1873, L. R. 8 Ch. 419; *Owen v. L. & N.-W. Rly. Co.*, 1867, L. R. 3 Q. B. 54; and see as to the term "heir," *De Beauvoir v. De Beauvoir*, 1852, 3 H. L. C. 524; 10 E. R. 206). So a gift to "His Majesty's Government" was directed to be disposed of under the royal sign-manual (*Newland v. A.-G.*, 1809, 3 Mer. 684; 36 E. R. 262), and the Attorney-General was held not to be a "person claiming some estate sought to be recovered" within 3 & 4 Will. iv. (1833), c. 27 (*A.-G. v. Magdalen College*, 1854, 23 L. J. Ch. 844). Of course, if a character has been falsely and fraudulently assumed, a bequest to one in that character will not be enforceable (*Wilkinson v. Joughin*, 1866, L. R. 2 Eq. 319); but if there has been no fraud, though there is a mistake in the character, it will be good (*In re Petts*, *supra*; *Rishton v. Cobb*, 1839, 9 Sim. 615; 59 E. R. 495; 47 R. R. 326). See also NEPHEWS AND NIECES; NEXT-OF-KIN.

[*Authority*.—Theobald, *Law of Wills*, 7th ed., 1908.]

Personal Act.—(Note.—In this article the Standing Orders of the House of Lords are cited as L. St. Or., and those of the House of Commons as C. St. Or.)

The term "personal Act" is applied to all estate, divorce, naturalisation, name, and other Acts not specified as local Bills (Erskine May's *Parliamentary Practice*, 11th ed., 1906, p. 839; and L. St. Or., 149). Personal Bills nearly always originate in the House of Lords, and, except in the case of Bills for the restoration of honours and lands, and for restitution in blood, the proceedings in relation thereto in that House are governed by the Standing Orders, 150 to 181.

The procedure is, briefly, as follows:—Petition for leave to bring in the Bill, with printed copy of proposed Bill annexed to the petition. One or more of the parties principally concerned must sign the petition. Copy of the Bill to be delivered to every person concerned before the second reading. As to infants interested, see L. St. Or., 163A.

1. *Restoration of Honours and Lands—Restitution in Blood.*—In these Bills the procedure is peculiar. They are, first of all, signed by the King, and then by command of the Crown presented to the House of Lords by one of its members, and thereafter pass through the ordinary stages of public Bills in both Houses. The assent of the Crown must be given before the first reading as well as subsequently to the proceedings in the two Houses, otherwise the proceedings are null and void, *ab initio* (May, *ibid.*, p. 862). See also *Earl Cowper's Restitution Act*, 1871; *Lords' Journals*, vol. ciii. pp. 474, 608.

2. *Estate Bills.*—Petitions for these, on presentation, must be referred to two judges of the High Court in England; and no such Bill may be read a first time until a copy of the petition, with the report of the judges thereon as to its reasonableness, has been delivered to the Chairman of Committees. As to the necessity for a reference to the judges in the case of Scotch and Irish Bills, see May, *ibid.*, p. 857; and L. St. Or., 153-157. As to the proceedings of committees on these Bills, see L. St. Or., 158-174; C. St. Or., 188b; and May, *ibid.*, p. 858.

3. *Divorce Bills.*—These now are brought in only on behalf of persons

domiciled in Ireland, where a divorce *a mensâ et thoro* can be obtained, but not a dissolution of marriage enabling the parties to marry again. No petition for a divorce Bill may be presented in the House of Lords until an official copy of the proceedings in the Court for matrimonial causes at the place of domicile or residence, at the suit of the party desiring to present the petition, has been delivered on oath at the Bar of the House; and no divorce Bill to dissolve a marriage for adultery, and to enable the petitioner to marry again, will be received unless a provision is inserted prohibiting the guilty parties from intermarrying (L. St. Or., 175, 176; May, *ibid.*, p. 859). The petitioner must attend on the second reading of any such Bill, in order that he may be examined, if the House thinks fit, at the Bar of the House (L. St. Or., 178; and see C. St. Or., 189-192); and counsel will be heard and witnesses examined in support of the Bill, whether there are any opposing petitions or not. Divorce Bills are committed to a committee of the whole House (May, *ibid.*, p. 861). The Lords' Standing Orders relating to divorce Bills apply to any domicile in the empire, and not only to Ireland.

4. *Naturalisation Bills*.—Before one of these Bills may be read a second time, the petitioner must produce a certificate from one of the Secretaries of State respecting his conduct, and must take the oath of allegiance at the Bar of the House; and the consent of the Crown to the Bill must have been previously signified (L. St. Or., 179, 180). These Bills are now seldom applied for, as the Naturalisation Acts provide readier and less expensive means of procedure. See NATURALISATION.

5. *Name Bills*.—These follow generally the rules as to personal bills, but on reaching the Commons are not referred to the Examiners (May, *ibid.*, p. 723), and only three clear days need elapse between their second reading and committee (*ibid.*, p. 949); as to fees, *ibid.*, p. 913.

Personal Bills sent down to the House of Commons are, generally speaking, subject to the same rules, and pass through the same stages, as other private Acts (May, *ibid.*, p. 862), as to which see PRIVATE BILL LEGISLATION.

It is not usual for personal Acts to be printed by the King's printers. A personal Act which is not so printed may be proved by an examined copy.

As to proving personal Acts of Parliament in the Courts, see Taylor on *Evidence*, s. 1523.

See also LOCAL ACT.

Personal Action.—See ACTIONS; ACTIO PERSONALIS MORITUR CUM PERSONA.

Personal Chattels.—See CHATTELS; PERSONAL PROPERTY; and BILLS OF SALE, Vol. II., at p. 244.

Personal Estate.—See PERSONAL PROPERTY.

Personal Identity.—See IDENTITY.

Personal Ornaments.—It was held in *Willis v. Curtois*, 1838, 1 Beav. 189; 48 E. R. 911; 49 R. R. 340; that a pocket-book and a case of physician's instruments were not personal ornaments; and as to other articles, such as pencil-cases, eye-glasses, etc., the Court expressed

the opinion that they come under the definition of ornaments, even though capable of being put to practical use. It is usual to include personal ornaments in a bequest of household furniture and effects, etc., and they are also generally excluded from the covenant in a marriage settlement, that future and after-acquired property shall be settled.

Personal Property.—The main division of property by the English law is into real and personal, and the word “property,” for the purposes of this division, and generally, is susceptible of two distinct meanings, namely, things the subject of rights, and rights in relation to things. The two leading senses of the word have recently been given as—(1) “the thing to which a person stands in a certain relation:” (2) “the relation in which the person stands to the thing” (*per* Chitty, L.J. (then J.), *In re Earnshaw-Wall*, [1894] 3 Ch. 156). But this division is not the earliest. The earliest was into lands, tenements, and hereditaments on the one hand, goods and chattels on the other; goods and chattels which are synonymous, including these interests of later origin in land, such as terms of years, wardships, estate by elegit, which in the thirteenth century were classed as chattels real—“real” inasmuch as though not recognised as realty, they “savoured of the realty” (see Pollock and Maitland’s *History of English Law*, vol. ii. 115 *et seq.*; and see for further details, CHATTELS).

The origin and reason of the division into real and personal is (to deal with the matter very shortly) due to the respective remedies of the dispossessed owner in each case. The owner dispossessed of land had an *actio in rem*, or *real action*, that is to say, might sue for specific recovery of the land itself, and his remedy was against the thing itself of which he had been deprived; but the owner of a chattel, if deprived of it, had an *actio in personam*, or personal action only, that is to say, could sue only for damages in respect thereof, his remedy being against the person who had deprived him of it, not against the thing itself, which he could not specifically recover (cp. Co. Litt. 118*b*). The older writers suggest as an alternative reason for the name “personal property” the fact that such property “belongs for the most part to the person of a man” (Co. Litt. loc. cit.), or consists “of things moveable which may attend a man’s person wherever he goes” (2 Black. Com., 884). Whether we accept or reject this latter derivation, there is little doubt that this class of property was looked upon as a transient and perishable commodity held in little esteem by our early legislators, who devoted all their care to the more permanent immoveables like lands, houses, and their profits. Accordingly, of real property they took, says Blackstone, “all care in ascertaining the right and directing the disposition,” . . . imagining it to be lasting, and such as . . . “would answer to posterity the trouble and pains that their ancestors employed therein; but at the same time entertained a very low and contemptuous opinion of personal estate.” It is for this reason, that whereas we find that the feudal laws had in quite early times laid the foundations of a great and complex system for regulating the holding, disposition, and incidents of land, the laws with regard to the personality were simple and few, and it was not until the Middle Ages that the civil law was adapted to some extent to meet the requirements of a class of property which, though unimportant and small at first, had increased and developed concurrently with the commerce of the country. It is difficult now to realise how trifling and unimportant was the amount of

personal property in feudal times, without bearing in mind the "scarcity of money and the ignorance of luxurious refinements" then prevailing, and whether or not personalty was held in little esteem by the early legislators, its scarcity undoubtedly at the time justified disregard of it. "The Real Property Law of England had its origin at a time when land and its rents and profits constituted nearly the whole tangible wealth of the country."¹

Property is also divided into moveables and immoveables: moveables comprising all personal property except chattels real; immoveables all real property, and also chattels real. The classification is of importance for the purpose of noting that the rule *mobilia sequuntur personam* does not apply to chattels real, and accordingly, as regards the conflict of laws, their devolution on the owner's death is governed by the *lex loci rei sitæ*, not by the law of the domicile of such owner. See LEASE; LEASEHOLD.

In the same way as the primary rule as regards ownership of real property is that the English law does not recognise any absolute ownership, but only an estate or interest therein (see ESTATES), so the converse is the cardinal rule as to personal property. The law recognises in it no estate or partial interest, but only absolute ownership, and there is no way in which successive interests can be carved out in personalty except by the interposition of trustees, who, having the full legal ownership, may hold the property upon the successive beneficial trusts declared by the settlement or will. Without such interposition the law gives the absolute ownership to the first taker. There is but one exception to this rule in favour of certain successive interests in personalty given by will. These are called executory bequests, and the law thereon will be found under EXECUTORY INTERESTS.

Personal property has been subdivided by many writers into corporeal and incorporeal; corporeal chattels being tangible things having actual existence, incorporeal chattels being intangible things such as exist in contemplation only (*e.g.* a right of action).

This classification, borrowed from the Roman law, has been objected to as unscientific, in that it contrasts things, the subject of rights with the rights themselves. Disregarding this, therefore, we may notice the more important and universally recognised subdivision of personalty into *choses in possession* and *choses in action*. CHOSSES IN POSSESSION are such tangible and personal chattels of which the owner has possession, actual or constructive, and possession in this sense includes not only absolute, but qualified possession, as in the case of animals *feræ naturæ*, in which case the nature of the thing itself precludes the idea of absolute ownership, or the qualified ownership of a bailee where the ownership is not permanent and may be defeated. Choses in possession formed of course far the greater part of personal property in early times. CHOSSES IN ACTION included originally such things the possession of which could not be recovered without an action, the right of action being contrasted with the actual right of possession. "All property *in action*," says Blackstone, "depends entirely upon contract, either express or implied" (2 Black. *Com.*, 397). Undoubtedly the right extended to damages for tort, and in "modern times lawyers have accurately or inaccurately used the phrase 'choses in action' as including all personal chattels that are

¹ *Cp.* the very first words of Challis, *R. P.*

not in possession" (Blackburn, L.J., in *Colonial Bank v. Whinney*, 1886, 11 App. Cas. 426), so that the phrase embraces not only the equitable choses in action, such as legacies, introduced by equity, but the large class of property unknown to the common law, such as consols, shares, and other modern investments, patents, copyright, and literary and scientific property. For details as to choses in possession and choses in action and the distinctions between them as to assignment and otherwise, see CHOSSES IN ACTION; CHOSSES IN POSSESSION; ASSIGNMENT OF CHOSSES IN ACTION.

Property, in the sense of a right to things, may be either qualified or absolute: it has already been noticed that as regards animals *feræ naturæ* one has a qualified property only, absolute property being restricted to inanimate things or tame and domestic animals. The qualified property which may subsist in animals *feræ naturæ* makes such animals personal property. It may be acquired by—(1) reclaiming and taming such animals, *i.e.* by industry; or (2) by confining them within the lands of the qualified owner; or in the case of young (3) "*propter impotentiam*," *i.e.* on account of their inability to fly away; or, lastly, by privilege, whereby the qualified owner may, to the exclusion of others, take and kill such animals within certain parts. As to this right of killing and taking game, see GAME LAWS.

Besides the incidents that distinguished personal from real property as regards the dispossessed owner's right of action and the limitation of successive interests, we may notice for the purpose of cross-reference the other marked differences as regards alienation and devolution. The neglect of personal property by the law in early days saved it from the restrictions on alienation both *inter vivos* and by will to which realty was subjected; this difference, as well as the difference in the mode of alienation, will be found treated of under CHATTELS; and the subject of involuntary alienation (*i.e.* for debt, etc.) of personal property under CHATTELS; EXECUTION. With regard to devolution on intestacy, the rules by which such devolution was regulated were those of the civil law, differing entirely from the rules regulating the descent on intestacy of realty. See DISTRIBUTION, STATUTES OF.

There are, however, certain chattels which descend, according to the laws of realty, to the heir instead of passing to the executor or administrator. The most important of these exceptions are title-deeds, heir-looms, fixtures, vegetables, and animals *feræ naturæ* (see the corresponding titles, and Wms. *R. P.*, pt. i. ch. i., "Of chattels which descend to the heir").

Personal property admits of the same classification with regard to the number and connection of its owners as does real estate (see ESTATES), that is to say, it may belong to a person or persons—

1. In severalty (there being but one owner);
2. As joint-tenants;
3. As tenants in common.

Joint-tenancy and tenancy in common may be classed together as "co-ownership."

Personal Representatives.—See EXECUTORS AND ADMINISTRATORS; LEGAL REPRESENTATIVES; REAL REPRESENTATIVE.

Personal Rights.—See IN PERSONAM; and *cp.* IN REM.

Personal Tithes.—See TITHES.

Personalty.—See PERSONAL PROPERTY.

Personation.—1. *Personation of Electors* is dealt with under CORRUPT PRACTICES, Vol. IV. p. 36.

2. *Personation of Bail.*—It is felony under sec. 34 of the Forgery Act, 1861, 24 & 25 Vict. c. 98, to acknowledge, in the name of another, without lawful authority or excuse (proof whereof lies on the accused), any recognisance of bail, *cognovit actionem* or judgment, deed, or instrument, before any Court, judge, or person lawfully authorised. Penal servitude, three to seven years, or imprisonment with or without hard labour for not over two years (s. 34, and 54 & 55 Vict. c. 69, s. 1).

3. There are numerous other cases in which personation of another is criminally punishable. At common law it is at most a cheat or fraud (see CHEAT; FALSE PRETENCES); but it is dealt with in many statutes in connection with FORGERY and like offences.

Personation of Sailors, in order to receive pay, pension, or prize-money, is a misdemeanor punishable summarily or on indictment under the Admiralty Powers Act, 1865, 28 & 29 Vict. c. 124, ss. 8, 9).

Personation of Soldiers, or men in the reserve or auxiliary forces, or their relatives, with like intent, is punishable under the Chelsea Hospital Act, 1826, 7 Geo. IV. c. 16, ss. 35, 38 (felony—life), and 2 & 3 Will. IV. c. 53, s. 49 (felony—life), and sec. 142 of the Army Act, 44 & 45 Vict. c. 58 (misdemeanor); and personation of an officer or soldier to obtain a billet, by sec. 121 of the latter Act.

Personation to obtain a *police pension* is punishable under 53 & 54 Vict. c. 45, s. 9.

Personation of Owners of Stock and Shares is felony in the cases of—

(1) Any share or interest in any stock, etc., transferable at the banks of England or Ireland, or in the capital stock of any body corporate, company, or society established by charter or statute, or of dividends in respect thereof (24 & 25 Vict. c. 98, s. 3), extended to a metropolitan stock (32 & 33 Vict. c. 102, s. 19), and local loan stock (38 & 39 Vict. c. 83, s. 32);

(2) India stock (26 & 27 Vict. c. 73, s. 14);

(3) Shares and interests in joint-stock companies and companies, and share warrants (30 & 31 Vict. c. 131, s. 35);

(4) National debt stock certificates (33 & 34 Vict. c. 58, s. 4); and

(5) Colonial stock certificates (40 & 41 Vict. c. 59, s. 31).

All these offences are punishable by penal servitude for life, or not less than three years, or by imprisonment, with or without hard labour, for not over two years (see 54 & 55 Vict. c. 69, s. 1).

By the *False Personation Act*, 1874, 37 & 38 Vict. c. 36, passed in consequence of the Tichborne trial, it is felony falsely and deceitfully to personate any person as the heir, executor, or administrator, wife, widow, next-of-kin, or relative, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property. It is punishable by penal servitude from three to five years, or imprisonment for not over two years, with or without hard labour (s. 1).

The enactment does not affect the alternative remedies for perjury, forgery, or other offences in connection with the personation (s. 2). The offence is not triable at Quarter Sessions.

As to personation of a husband, see RAPE.

There are also minor provisions punishing personation of emigration agents of the Board of Trade (57 & 58 Vict. c. 60, s. 354); police officers

(2 & 3 Vict. c. 47, s. 17, London; 2 & 3 Vict. c. 93, s. 15, county; 10 & 11 Vict. c. 89, s. 12, towns); factory and workshop inspectors, etc. (1 Edw. VII. c. 22, s. 139 (*f*)); and of masters in giving characters of servants (32 Geo. III. c. 56).

Person of Unsound Mind.—See LUNACY.

Per stirpes.—See PER CAPITA.

Peru.—*Area and Earlier History.*—The South American Republic of Peru is situated on the western side of the continent, and is bounded on the north by the Republic of ECUADOR (*q.v.*), on the south by that of CHILE (*q.v.*), whilst on the east its area adjoins those of Brazil and Bolivia. It has an area of 695,733 square miles, or rather more than three times the size of Germany. The ancient Aztec Empire was wrested from the Aztecs by the Spaniards under Cortes in the sixteenth century, and Peru became the most important of the Spanish vice-royalties in South America. The Spanish rule was continued until July 15, 1821, when the Republic declared its independence (Hertslet's *State Papers*, vol. ix. p. 393), which, however, was not recognised by Spain until 1824 after a protracted war.

Constitution.—The present constitution was established November 13, 1860 (*ibid.*, vol. lxxix. p. 721), and after being suspended for various periods was revived in 1885 after the Chilian War, but with certain modifications. The executive authority is vested in a President, elected directly for four years, and ineligible for election at the next presidential election. Two Vice-Presidents assist the President, who acts through six responsible Ministers of State. The legislative power is in a Congress of two Chambers—a Senate and a House of Representatives. The Senate consists of fifty-one members elected for six years by a direct vote, of whom one-third retire biennially. Senators must have an annual income of £100, or belong to a scientific profession. The House of Representatives consists of 116 deputies, also elected for six years by a direct vote, of whom one-third retire biennially. The qualifications for a seat in the House of Representatives are the same as for the Senate, save that the necessary annual income is only £50.

Local Government and Courts of Law.—There are eighteen departments divided into ninety-eight provinces, and subdivided into 801 districts. Each department is administered by a prefect, appointed by the President, and a junta or council, whose members are elected by the provincial councils. Each province is administered by a sub-prefect, appointed by the President, and a provincial council, and each district by a governor, appointed by the prefect of the department, and a district council. Municipal councillors are elected by direct vote, foreigners being eligible.

There is a Supreme Court of Justice, and superior and minor Courts in the nine judicial districts of the Republic.

Application of Imperial Acts.—By Order in Council of July 7, 1897 (St. R. & O. Rev., vol. viii., "Merchant Shipping," p. 285), the British Regulations of 1896 for the prevention of collisions at sea were applied to Peru, and by Order in Council of August 18, 1852 (*ibid.*, p. 86), provision was made for the apprehension and carrying back of seamen deserting from Peruvian ships in whatever part of His Majesty's dominions they might be found.

By Order in Council of May 7, 1907 (St. R. & O., 1907, p. 282), the Imperial Extradition Acts have been applied to the Treaty of January 26, 1904, with the Republic.

[See *The Statesman's Year-Book*; *Encyclopædia Britannica*.]

Perversity.—See NEW TRIAL; VERDICT.

Petition.—*Generally.*—A petition is an application made in a summary way to the Court, based upon a written statement of the facts leading up to the relief sought, and differing in that respect from a motion (see MOTION).

Except with regard to petitions of right (a subject which is treated separately, see PETITION OF RIGHT), the jurisdiction by petition is practically unknown in the King's Bench Division. The only instances of petitions given in Chitty's *Archbold's Practice* are petitions addressed to the Lord Chief-Justice to assign a guardian to a defendant of unsound mind, and for leave to sue *in formâ pauperis*. Petitions in bankruptcy, divorce, and lunacy have been dealt with under those respective titles in other volumes of this work, whilst petitions of appeal to the House of Lords have been treated under the head of APPEALS. This article, therefore, will be confined to petitions in the Chancery Division.

The jurisdiction of the High Court by petition is preserved by the rules under the Supreme Court of Judicature Acts (R. S. C., 1883, Order 1, r. 2).

By the express terms of sec. 100 of the Judicature Act, 1883, 36 & 37 Vict. c. 66, a petition is a pleading, and is subject therefore to the provisions of the rules of Court with regard to pleadings.

Petitions of Various Kinds.—A petition may either be presented in a pending action or matter, or may itself be the originating proceeding.

A petition may be either—(1) of course, or (2) special.

Petitions of Course.—An order of course is described as an order made on an *ex parte* application, to which a party is entitled as of right on his own statement and at his own risk (R. S. C., 1883, Appendix N. No. 195).

Orders made on petitions of course were formerly drawn up, passed, and entered in the office of the Secretaries of the Master of the Rolls, but are now drawn up, passed, and entered by or under the directions of the registrars of the Chancery Division (Order 62, r. 18).

Notwithstanding the provisions of R. S. C., May 1887, with regard to the district registrars in Liverpool and Manchester, such district registrars have no jurisdiction to grant orders of course to tax a solicitor's bill, though possibly they may have power to make orders of course simply relating to procedure in matters assigned to them (*In re Porrett*, [1891] 2 Ch. 433).

It is of great importance that the utmost good faith should be kept with the Court upon an application for an order of course. If the order be obtained irregularly, or on the suppression or misrepresentation of material facts, it will be discharged (*Victor v. Devereux*, 1843, 6 Beav. 584; 49 E. R. 952; *Hertford v. Suisse*, 1844, 7 Beav. 160; 49 E. R. 1024; *Holcombe v. Antrobus*, 1845, 8 Beav. 405; 50 E. R. 159; *De Feuchères v. Dawes*, 1843, 11 Beav. 46; 50 E. R. 733; *Wyllie v. Ellice*, 1848, 11 Beav. p. 105; 50 E. R. p. 756; *In re Winterbottom*, 1851, 15 Beav. 80; 51 E. R. 466; *Bidder v. Bridges*, 1884, 26 Ch. D. 1); and that without regard to the merits of the case (*Harris v. Start*, 1838,

4 Myl. & Cr. 261; 41 E. R. 102; *Brookes v. Purton*, 1841, 4 Beav. 494; 49 E. R. 430). "There are few things more important than that parties who apply for an order of course should fairly state all the circumstances" (*per* Lord Langdale, M.R., *Victor v. Devereux*, 1843, 6 Beav. 584; 49 E. R. 952).

An order of course ought to be served as soon as possible, otherwise it will not affect any step regularly taken by the opposite party before service of the order (*Church v. Marsh*, 1843, 2 Hare, 652; 67 E. R. 269).

After service an order of course cannot be amended and re-served (*Wool v. Townley*, 1845, 9 Beav. 41; 50 E. R. 257).

It is not possible to enumerate all the cases in which orders can be obtained on petitions of course. A very familiar example of such an order made on an originating proceeding is furnished by what is known as the common order to tax a solicitor's bill (see as to this, *In re Pollard*, 1888, 20 Q. B. D. 655), whilst an order to carry on proceedings under R. S. C., 1883, Order 17, may be cited as an instance of such an order made in the course of the ordinary proceedings in a pending action.

Special Petitions.—It has been said that a petition is the appropriate mode of applying to the Court in a pending matter, where a long and intricate statement is necessary to put the Court in possession of all the facts of the case (*Shipbrooke v. Hinchinbrook*, 1807, 13 Ves. pp. 393, 394; 33 E. R. p. 342), or where the order sought is in the nature of a judgment or final order, or upon matters arising out of the judgment (*Winter v. Innes*, 1838, 4 Myl. & Cr. 101; 41 E. R. 40; 48 R. R. 24). The greater facilities afforded by modern practice for the disposal of applications in chambers, and, in particular, the remarkable growth of the jurisdiction by originating summons, have had the effect of largely diminishing the number of petitions which are presented so far as administration proceedings are concerned.

Originating Petition.—Where proceedings are commenced by petition, it must be marked by a clerk in the office of the Chancery registrars with the name of one of the judges (Order 5, r. 9 (*d*)); and every subsequent petition relating to the same matter must be marked with the name of the same judge (Order 5, r. 9 (*e*)).

Originating petitions are usually presented under the statutory jurisdiction of the Court, as, for instance, for a winding-up order under the Companies Acts, 1862-1890, or for reduction of capital under the Companies Act, 1867, 30 & 31 Vict. c. 131, or for any other purpose under the numerous Acts of Parliament which provide for the exercise of the jurisdiction of the Court by petition. In this connection it may be observed that, although procedure by petition may be prescribed by the statute creating the jurisdiction, yet there is power by virtue of the combined effect of sec. 16 of the Court of Chancery Act, 1855, 18 & 19 Vict. c. 134, and sec. 13 of the Judicature Act, 1884, 47 & 48 Vict. c. 61, for the Court by rule to direct that such application shall be made by summons in chambers. This statutory power has been exercised in numerous cases. Thus the Parliamentary Deposits Act, 1846, 8 & 9 Vict. c. 73, provides that applications thereunder shall be made by petition, for which a summons at chambers has been substituted by the Rule Committee (Order 55, r. 2 (15)); and many similar instances might be given.

Form of Petition.—A petition in a pending matter must be entitled in the same manner as the action or matter in which it is presented.

Where it is presented under the statutory jurisdiction it should, as a rule, be entitled in the matter of the Act conferring the jurisdiction, as well as in the particular matter to which the petition relates. A petition under the Trustee Act, 1893, 56 & 57 Vict. c. 53, should state the particular sections of the Act under which the application is made (*In re Moss's Trusts*, 1888, 37 Ch. D. 513; *In re Hall's Settlement Trusts*, 1888, 58 L. T. 76).

Where on petition under the Settled Estates Act, 1877, an order is made under the general power conferred on the Court by sec. 39 of the Conveyancing Act, 1881, the petition need not be entitled under the latter Act (*In re Landfield's Settled Land*, *Landfield v. Landfield*, 1882, 30 W. R. 377).

A petition under sec. 10 of the Married Women's Property Act, 1870, need only be entitled in the matter of that Act, and not of the Married Women's Property Act, 1882, nor of the Trustee Act, 1893 (*In re Kuyper's Policy Trusts*, [1899] 1 Ch. 38, following *In re Turnbull*, *Turnbull v. Turnbull*, [1897] 2 Ch. 415).

Every petition for dealing with money or securities in Court, chargeable with any duty payable to the Revenue, or the dividends on such securities must contain a statement whether such duty has or has not been paid (R. S. C., 1883, Order 22, r. 12A).

A petition is addressed to the High Court of Justice, not as formerly, to the Lord Chancellor.

A petition must state by whom it is presented; and, where the petitioner is not a party to the proceedings, his residence and description must appear on the face of the petition (*Glazbrook v. Gillatt*, 1846, 9 Beav. 492; 50 E. R. 434).

Persons under disability petition by their next friend.

In the case of paupers it is provided that no petition shall be presented on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor (Order 16, r. 29).

The petition may be either written or printed (Order 19, r. 9). Generally the rules as to preparation of pleadings apply to a petition (Order 19, rr. 4, 21, 23-25).

Footnote.—At the foot of every petition (not being a petition of course), and of every copy thereof, a statement must be made of the persons, if any, intended to be served therewith; and if no person is intended to be served, a statement to that effect must be made at the foot of the petition, and of every copy thereof (Order 52, r. 16). The respondents should be mentioned by name in the footnote, and not merely described as plaintiffs or defendants (*Meyrick v. Laws*, 1877, W. N. 223).

Petitions, how Answered.—Petitions (not being for an order of course) are answered in the name of the senior registrar for the time being (Order 62, r. 18), except in the case of petitions presented in the district registries of Liverpool and Manchester, when they are answered in the name of one of such respective registrars (R. S. C., May 1887, r. 2). Answering a petition consists in a memorandum being written in the margin stating the day on which the petition will be heard. As to the practice upon the presentation of a winding-up petition, and as to priority where more than one such petition is presented, see *In re Building Societies Trust*, 1890, 44 Ch. D. 140.

Service.—Unless the Court or a judge gives leave to the contrary,

there must be at least two clear days between the service of a petition and the day appointed for hearing it (Order 52, r. 17).

Parties interested in the subject-matter of the petition ought to be served; but, under special circumstances, service has been dispensed with (*Lambert v. Newark*, 1849, 3 De G. & Sm. 405; 64 E. R. 536; *In re Wise*, 1852, 5 De G. & Sm. 415; 64 E. R. 1178; *In re Bellasis's Trusts*, 1871, L. R. 12 Eq. 218).

Where a fund in Court has been mortgaged, the mortgage containing a power of sale which has been properly exercised, and there is no question about the title of the mortgagee, it is not the present practice to require a petition for payment of the fund out of Court to be served on the mortgagor (*Catterson v. Clarke*, [1905] W. N. 173).

On a petition under the Trustee Relief Act for payment out of Court of a fund to which numerous parties were entitled, most of whom were not before the Court, a former order having been made directing class inquiries, and the chief clerk having made his certificate, it was ordered that the petitioner be at liberty to serve a copy of the petition, the former order, and the chief clerk's certificate upon the several persons named in the certificate, and that the petition should stand over till such persons had been served (*In re Battersby's Trusts*, 1878, 10 Ch. D. 228).

Where the petition is presented in an action, and the defendant has not appeared within the time limited for that purpose by the rules of Court, the petition can be served on him in the usual way without special leave (Order 52, r. 8), or it may be filed against him (Order 19, r. 10; Order 67, r. 4). If the defendant has appeared, service will be effected in the usual way on him or his solicitor. An originating petition must be personally served.

Substituted service may in a proper case be allowed (*In re Blackwood's Settlement*, 1867, W. N. 114; *In re Bonelli's Electric Telegraph Co.*, 1874, L. R. 18 Eq. 655).

There has been a considerable conflict of authority on the question whether leave can be properly given to serve a petition out of the jurisdiction. On the one hand, prior to the Rules of the Supreme Court, 1883, such service was allowed in *In re Bonelli's Electric Telegraph Co.*, 1874, L. R. 18 Ex. 655; *In re Haney's Trusts*, 1875, L. R. 10 Ch. 275; *In re Morant*, 1879, W. N. 144. Even since the decision in *In re Busfield*, *Whaley v. Busfield*, 1886, 32 Ch. D. 123, where it was held that the Court has no power to order service out of the jurisdiction, except where it is authorised by statute to do so (*per* Cotton, L.J., p. 132); and further, that the General Orders of 1883 contain a complete code governing service out of the jurisdiction (*per* Fry, L.J., p. 133), orders have been made allowing foreign service of petitions under the Trustee Relief Act (*Colls v. Robins*, 1886, 55 L. T. 479; *In re Gordon's Settlement Trusts*, 1887, W. N. 192). But North, J., subsequently declined to act upon the last-named case, and the Court of Appeal left the question undecided, merely giving leave to serve solicitors who had presented a former petition and were willing to accept service (*In re Jellard*, 1888, 39 Ch. D. 424). In view of that case, Kekewich, J., refused leave in *In re Stanway's Trusts*, 1892, W. N. 11 (see further, SERVICE OUT OF THE JURISDICTION).

Appearance by Parties under Disability.—An infant served with a petition appears by guardian *ad litem*. No order is now necessary for the appointment of such guardian, but the solicitor by whom the infant

appears must previously make and file an affidavit in the prescribed form (Order 16, r. 19). In the case of a respondent to a petition by a person of unsound mind, not so found by inquisition, an order of course to appoint a guardian *ad litem* must be obtained (*In re Greaves*, 1854, 2 W. R. 353).

Security for Costs.—A petitioner resident out of the jurisdiction may be ordered to give security for costs (*Ex parte Seidler*, 1841, 12 Sim. 106; 59 E. R. 1071; 56 R. R. 25; *Atkins v. Cooke*, 1857, 3 Drew. 694; 61 E. R. 1068; *In re Home Assurance Association*, 1871, L. R. 12 Eq. 112), except where he is a party to the cause (*Cochrane v. Fearon*, 1854, 18 Jur. 368). A party served with notice of judgment, and petitioning, has been ordered to give security (*Partington v. Reynolds*, 1858, 6 W. R. 307).

Setting Down and Hearing.—A petition is set down for hearing before the judge with whose name it is marked. The judges of the Chancery Division hear petitions on certain days in each sittings (usually on one day in each week). Petitions are heard in the order in which they appear in the paper, unopposed petitions being taken first.

Copy for Use of Court.—The copy of the petition supplied for the use of the Court must not be typewritten on thin paper, otherwise the costs may be disallowed (*Powell v. Hellicar*, 1903, W. N. 154).

Evidence.—Evidence on a petition may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making such affidavit (Order 38, r. 1). The rule leaves absolute discretion to the judge either to grant or refuse leave to cross-examine a witness on an affidavit made in support of an interlocutory application (*La Trinidad Limited v. Browne*, 1887, 36 W. R. 138).

After amendment of a petition it is not necessary to have the affidavits resworn (*In re Harris*, 1862, 8 Jur. N. S. 166; *Fisher v. Coffey*, 1855, 1 Jur. N. S. 956). In *In re Varteg Chapel*, 1853, 10 Hare, App. xxxvii.; 68 E. R. 1136, affidavits already sworn were made evidence after amendment in the title of a petition by being exhibited to an affidavit referring to them.

Affidavits sworn before presentation of the petition have been accepted (*In re Varley's Trust Estate*, 1865, 14 W. R. 98; *In re Gombault's Trusts*, 1868, W. N. 243).

Affidavits erroneously entitled were allowed to be taken off the file, and resworn in their proper title (*Pearson v. Wilcox*, 1853, 10 Hare, App. xxxv.; 68 E. R. 1134).

Affidavits sworn in one cause or matter may, by leave of the Court, be used in another cause or matter (*Jones v. Turnbull*, 1853, 17 Jur. 851; *In re Pickance's Trusts*, 1853, 10 Hare, App. xxxv.; 68 E. R. 1134).

Amendment.—Leave may be given to amend a petition. Such leave is usually obtained at the hearing. The amendments may extend to facts which have occurred since the petition was presented, or since leave to amend (*Maude v. Maude*, 1852, 5 De G. & Sm. 418; 64 E. R. 1179; *Robinson v. Harrison*, 1852, 1 Drew. 307; 61 E. R. 469; *In re Westbrook's Trusts*, 1871, L. R. 11 Eq. 252).

Where the petitioner died after presentation of the petition, leave was given to amend by stating the fact, and substituting a new petitioner (*In re Wilkinson's Settled Estates*, 1869, L. R. 9 Eq. 71).

Leave has been given to amend after the order has been made, and even after it has been completed by being passed and entered (*Hislop*

v. *Wykeham*, 1855, 3 W. R. 286; *In re Havelock's Trusts*, 1865, 14 W. R. 26, 174; *In re Bunnett's Trusts*, 1865, 1 Jur. N. S. 921). Where a petition had been presented without the authority of some of several co-petitioners, and an order had been made on it, an application to rescind the order was refused, but liberty to amend by striking out the applicants as petitioners was given (*In re Savage*, 1880, 15 Ch. D. 557).

An amended petition need not be re-served (*In re Cartwright's Trust*, 1860, 8 W. R. 492; *In re Medow's Trusts*, 1864, 12 W. R. 595).

Petitions for Revocation of Patent.—When a petition for revocation of a patent comes into the list of petitions, liberty should be given to either party to put it into the witness list for trial on or after a future day to be then fixed (*In re Borrowman's Patent*, [1902] W. N. 56).

Effect of Order on opposed Petition.—A petition is just as much a litigious proceeding as a bill in the Court of Chancery, if there is jurisdiction to bring the parties before the Court on it. And, therefore, where a petition under the National Debt Act, 1870, 33 & 34 Vict. c. 71, had been heard on the merits, and dismissed on the ground that the petitioner had failed to make out his title, it was held that he could not, on the subsequent discovery of fresh evidence, present a fresh petition for the same object without leave of the Court previously obtained (*In re May*, 1885, 37 Ch. D. 516).

Orders made in Petition.—*Seem*, an order may be made removing a married woman's restraint on anticipation under sec. 39 of the Conveyancing Act, 1881, upon an application by petition; it is not obligatory to proceed by summons under sec. 69 (3) (*In re Blundell*, [1901] 2 Ch. 221).

As to the jurisdiction of the Court with regard to rectification of deeds on petition, see *In re Hoffe's Estate Act*, 1900, 48 W. R. 507.

A petition for revocation of a patent should be heard in open Court, and not, even by consent, in chambers (*In re Clifton's Patent*, [1904] 2 Ch. 357).

Death of Petitioner.—Where a sole petitioner dies after an order made on the petition directing inquiries, and whilst those inquiries are pending, the Court will order the petition to be continued and carried on by the representatives of the petitioner (*In re Allan's Estate*, 1875, 1 Ch. D. 82).

Referring Petition to Chambers.—Where the title of the parties is complicated and requires careful investigation, it is common to adjourn the petition into chambers. In such case a note of the adjournment is sent by the registrar to the Master. After the evidence has been properly considered, and found satisfactory, a minute of the order to be made is indorsed in the fold of the petition, and the order is drawn up by the registrar. Sometimes an order is made on the hearing of the petition directing inquiries to be made in chambers, and adjourning the further hearing of the petition. When that course is adopted, after the certificate of the Master has been filed, the petition will be restored to the paper for further hearing.

Filing Petition.—No order on a petition can be passed until the original has been filed in the Central Office (Order 61, r. 15). Where the original petition was lost the Court has allowed a copy to be filed (*Sanderson v. Walker*, 1836, 1 Myl. & Cr. 359; 40 E. R. 413; *Andrews v. Walton*, 1836, 1 Myl. & Cr. 360; 40 E. R. 413; *Smith v. Harwood*, 1853, 1 Sm. & G. 137; 65 E. R. 60).

Where Respondent does not Appear.—It is much to be regretted that the practice does not provide for a respondent entering a formal appearance to an originating petition. The want of such a provision occasionally causes no small inconvenience. For, inasmuch as an appearance is not required to be entered, there can be no default of appearance, and therefore no power to bind the respondent by filing any subsequent summons or other proceeding under Order 67, r. 4. It seems, therefore, that in such a case, if, on the hearing of the petition, an order is made directing inquiries, the petitioner has no course open to him but to serve the summons to proceed on the respondent personally.

Court of Appeal.—The Court of Appeal has no jurisdiction to hear an original petition, but can only do so by way of appeal from an order of a judge of first instance (*In re Dunraven Adare Coal and Iron Co.*, 1875, 24 W. R. 37; *Brown v. Collins*, 1883, W. N. 155; 25 Ch. D. 56).

Costs.—Where any petition in a cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs of perusing the same, the amount to be tendered is £1, 10s. The party making such payment will be allowed the same in his costs, provided such service was proper, but not otherwise. This will not, however, prejudice the right of either party to costs, or to object to costs where no such tender is made, or where the Court or judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition, without appearing thereon, he is to be allowed a fee not exceeding the amount aforesaid (Order 65, r. 27 (19)). Under the old practice the sum to be tendered was two guineas.

Where there is no tender the petitioner may be ordered to pay the respondent's costs of appearance, even though he have no interest (*Wood v. Boucher*, 1870, L. R. 6 Ch. 77; *Clark v. Simpson*, 1868, L. R. 6 Eq. 336; *In re Gore Langton's Estates*, 1875, L. R. 10 Ch. 328; *In re Halstead United Charities*, 1875, L. R. 20 Eq. 48; *Ex parte Jones*, 1880, 14 Ch. D. 624). If a petitioner, on serving a petition on a respondent, the necessity for whose appearance is a matter of doubt, at the same time tenders him the prescribed fee in order to enable him to get legal advice, and the respondent appears, the Court will consider whether the appearance be justified or not; and if it finds that the appearance was not justified, will not order the petitioner to pay such respondent's costs of appearance. Otherwise the respondent must have his costs (*In re Duggan's Trusts*, 1869, L. R. 8 Eq. 698).

Where no tender was made to the respondents, they were allowed a fixed sum of two guineas each (*Somes v. Martin*, 1882, W. N. 113).

Trustees were refused their costs of appearance on a petition under the Trustee Relief Act, after tender made and accepted (*In re Sutton* 1882, 21 Ch. D. 855; but see *In re Vardon's Trusts*, 1885, 33 W. R. 297); in which case trustees who had paid into Court a fund representing part only of a share, the title to which was disputed, and retained the remainder in their hands, and accepted a tender under the rule, were allowed their costs of appearing on the petition out of the remainder of the share.

It has been held by Swinfen Eady, J., that the practice of making a tender for costs was never intended to apply to the trustees of a

subsisting settlement affecting funds in Court the subject-matter of a petition whose duty it is to appear and protect the funds of which they are trustees (*Lowe v. Moore*, [1906] W. N. 142).

Where any party appears upon an application or proceeding in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance, unless the Court or a judge shall expressly direct such costs to be allowed (Order 65, r. 27 (23)). A party who has been served with a petition and appears unnecessarily will not be allowed his costs. See *Herman v. Dunbar*, 1857, 23 Beav. 312; 53 E. R. 122; *Day v. Croft*, 1853, 19 Beav. 518; 52 E. R. 452; *Barton v. Latour*, 1854, 18 Beav. 526.

Where an unnecessary party had been served with a petition solely in consequence of a claim set up by him, he was left to bear his own costs (*In re Shrewsbury School*, 1849, 1 M. & G. 85; 41 E. R. 1195).

If two petitions are presented where the object sought might have been obtained by one petition, the petitioner will be ordered to pay the extra costs, occasioned by such a proceeding (*In re Wortham*, 1851, 4 De G. & Sm. 415; 64 E. R. 893).

Where a summons is prescribed as the mode of application, there is a discretion in the Court to allow the costs of a petition (*In re Bethlehem and Bridewell Hospitals*, 1885, 36 Ch. D. 541).

[*Authorities.*—*The Annual Practice*; Daniell's *Chancery Practice*, 7th ed., 1901, pp. 1317-1326; Daniell's *Chancery Forms*, 5th ed., 1901, pp. 825-828; Morgan and Wurtzburg on *Costs*, 1882; Seton's *Judgments and Orders*, 6th ed., 1901, ch. xxiii.; Williams on *Petitions in Chancery and Lunacy*, 1880.]

Petition of Right.—(*Petition de droit*).

TABLE OF CONTENTS.

I. Nature and Origin of Petition of Right	96	VI. Form of Procedure by Petition of Right	100
II. When Remedy of Petition of Right Available	97	(a) The Petitions of Right Act, 1860	100
III. When Remedy by Petition of Right not Available	98	(b) Method of Procedure before the Act	100
IV. Parties to a Petition of Right	99	(c) The New Procedure under the Act	101
V. Within what Time a Petition of Right must be Prosecuted	99		

I. *Nature and Origin of Petition of Right.*—This is an ancient common-law remedy against the Crown, for obtaining possession or restitution of either real or personal property, and is said to owe its origin to Edward I. (*Chitty's Prerogatives of the Crown*, 340; Bacon's *Abr.*, "Prerogative" (E), 475; *per curiam* in *Tobin v. R.*, 1864, 16 C. B. N. S., at p. 356; and see Pollock and Maitland's *History of English Law*, vol. i. p. 176), before whose reign, according to some authorities, an action was maintainable by a subject against the Crown (Fitzherbert's *Abr.*, "Error," pl. 22; Broom's *Legal Maxims*, 7th ed., p. 42 (v.); but see *per curiam* in *Tobin v. R.*, *supra*), a method of procedure so obviously inappropriate, that the remedy by petition of right was substituted for it, with the object of reconciling the dignity of the Crown and the rights of the subject (*per* Lord Cottenham, L.C., *Moncton v. A.-G.*, 1848, 2 Mac. & G., at p. 412; 42 E. R. 156). The origin of the term "Petition of Right"

seems to be somewhat doubtful, but it is probably derived from the words with which the petition formerly concluded and was indorsed (Clode's *Petition of Right*, pp. 25, 26; but see Manning's *Exchequer Practice, Revenue Branch*, p. 84). The remedy is, however, substantially, as well as nominally, a petition of *right* (though the person presenting it is called a suppliant), as the prayer of it is grantable *ex debito justitiæ*, in accordance with the words of *Magna Carta*, "*Nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum*" (Chitty's *Prerogatives of the Crown*, p. 345; Manning's *Exchequer Practice, Revenue Branch*, p. 84). At all events, though the granting of the *fiat* by the Crown is in itself an act of *grace* (*Tobin v. R.*, 1863, 32 L. J. C. P., at p. 221; *Irwin v. Grey*, 1862, 3 F. & F. 635), it is not competent for the Crown or its responsible advisers to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right, though the form and application be to the grace and favour of the Crown (*per* Lord Langdale, M.R., in *Ryves v. The Duke of Wellington*, 1846, 9 Beav., at p. 600; 50 E. R. 467).

II. *When Remedy by Petition of Right Available.*—The remedy by petition of right arises only where the rights of the Crown are *directly* in question, for, where they are only *incidentally* concerned in an action, the Attorney-General may be made a defendant as representing the Crown (Daniell's *Chancery Practice*, 7th ed., pp. 61 *et seq.*, pp. 1296 *et seq.*), and may also file an information against the plaintiff, in an action between subjects involving the rights of the Crown, praying for a declaration of such rights, and for the transfer of pending proceedings to the Revenue side of the King's Bench Division, and for a stay thereof until the information has been heard and disposed of (*Lord Stanley v. Wild & Son*, [1900] 1 K. B. 256). Stated in general terms, the only cases in which a petition of right is available are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money; or when a claim arises out of a contract, as for goods supplied to the Crown or to the public service (*per curiam* in *Feather v. R.*, 1865, 6 B. & S., at p. 294, and in *Windsor and Annapolis Rly. Co. v. The Queen and the Western Counties Rly. Co.*, 1886, 11 App. Cas., at pp. 614, 615; and see sec. 16 of the Petitions of Right Act, 1860, *post* 102). Thus it will lie to compel payment of annuities granted by the Crown (*The Bankers' Case*, 1690, 14 St. Tri. 1); for a pension out of the Civil List, at the suit of an assignee (*Oldham v. Lords of the Treasury*, 1823, cited 6 Sim. 220; 58 E. R. 576; *Priddy v. Rose*, 1817, 3 Mer. 86; 36 E. R. 33; 17 R. R. 24; Chitty's *Prerogatives of the Crown*, 344), for a mere money claim (*per* Lord Denman, C.J., in *The Baron de Bode v. R.*, 1845-1851, 6 St. Tri. N. S., at p. 262; *Executors of Percival v. R.*, 1864, 33 L. J. Ex. 289; *Executors of Cobbold Perry v. R.*, 1868, L. R. 4 Ex. 27; *Crossman and Another v. R.*, 1886, 18 Q. B. D. 256); *semble*, for the return of overpaid probate duty (*In re Nathan*, 1884, 12 Q. B. D. 461; disapproving of *R. v. Lords Commissioners of the Treasury*, 1835, 4 Ad. & E. 286); for a rent-charge (*Wicks v. Dennis*, 1589, 1 Leon. 190; 74 E. R. 175); to recover hereditaments (*Sadler's Case*, 1588, 4 Rep. 426; Com. Dig. "Prerogative" (D), 78; Bacon's *Abr.*, "Prerogative" (E), 475) or leaseholds (*In re Gosman*, 1880, 15 Ch. D. 67); to enforce an agreement for a lease granted by the Crown (*James v. R.*, 1874, L. R. 17 Eq. 502; *Davis v. Adams*, 1876, W. N. 202); and for a declaration of what is due

under a contract with the British Admiralty contained in letters (*Cooper v. The King*, 1903, *Times*, February 23, p. 3). The remedy by petition of right also lies for breach of contract, even though resulting in unliquidated damages, or to recover money claimed either by way of debt or by way of damages on breach of contract (*Thomas v. R.*, 1874, L. R. 10 Q. B. 31; *Feather v. R.*, 1865, 6 B. & S., at pp. 293, 294), and this whether the breach of contract complained of be occasioned by the acts or by the omissions of the Crown officials (*Windsor and Annapolis Rly. Co. v. R.*, 1886, 11 App. Cas. 607), or arise otherwise in respect of matters of contract (Seton on *Judgments*, 6th ed., vol. i. p. 397; and see *Palmer v. Hutchinson*, 1881, 6 App. Cas. 619; *Macbeath v. Haldimand*, 1786, 1 T. R. 172, 176; 1 R. R. 177; *Oldham v. Lords of the Treasury*, 1823, cited 6 Sim. 220; 58 E. R. 576; *Churchward v. R.*, 1865, L. R. 1 Q. B. 173, 186); *St. James and Pall Mall Electric Light Co., Ltd. v. R.*, 1904, 73 L. J. K. B. 518, where, in a petition of right case, compensation was claimed and awarded against the postmaster-general, under sec. 7 of the Telegraph Act, 1863, for damage caused in the course of laying down certain telephone wires; and *City of Dublin Steam Packet Co. v. The King*, 1908, *Times*, 27th March, where the suppliants claimed an exclusive right against the Crown to the use of a pier. Thus, in the case of *Stewards & Co., Ltd. v. The Queen*, [1900] 16 T. L. R. 153, the suppliants in a petition of right recovered damages from the Crown for breach of contract caused by the refusal of the Admiralty to accept the whole of two millions of stone which the suppliants were bound by their contract to deliver "as required" for the construction of Portland New Breakwater; while in *Yeoman v. The King*, [1904] 2 K. B. 429, demurrage was recovered upon a charter party made between the suppliant and the Director of Transports for and on behalf of the Lords Commissioners of the Admiralty.

III. *When Remedy by Petition of Right not Available.*—On the other hand, a petition of right must disclose some legal right (the violation of which is alleged) capable of being enforced against the King in some municipal Court (*West Rand Central Gold Mining Co., Ltd. v. The King*, [1905] 1 K. B. 391), otherwise it is not available (*per curiam* in *Feather v. R.*, 1865, 6 B. & S., at p. 295). It does not, however, extend to all such matters as are cognisable in a Court of law or equity between subject and subject. Thus, notwithstanding alleged decisions to the contrary (collected in 6 M. & G. n. (a) pp. 251 *et seq.*), a petition of right does not lie in respect of a claim founded upon *tort*, because the Crown can do no wrong (*Tobin v. R.*, 1864, 16 C. B. N. S. 310; and see *Raleigh v. Goschen*, [1898] 1 Ch. 73); nor for compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty (*ibid.*); nor against the succeeding sovereign for injuries sustained in the preceding reign (*Canterbury (Viscount) v. R.*, 1843, 12 L. J. Ch. 281); nor to obtain payment of a debt due to a British subject from the subject of a foreign Government out of a sum of money received by the British Government from the foreign Government on account of debts due from its subjects to British subjects (*Rustomjee v. R.*, 1876, 2 Q. B. D. 69). In the following cases, also, the petition of right failed, namely, where it was sought to recover from the Crown, out of a fund paid under a treaty with a foreign Power, as compensation for debts due to British subjects, the payment of an amount claimed in respect of one of such debts (*Rustomjee v. R.*, 1876, 2 Q. B. D. 69; and see *Baron de Bode v. R.*, 1851, 3 H. L. C. 449; 10 E. R. 176; S. C.

6 St. Tri. N. S. 237); where the claim was for compensation on being compulsorily retired upon half-pay from a civil or military office alleged to be permanent (*In re Tufnell*, 1876, 3 Ch. D. 164; *Dunn v. The Queen*, [1895] 1 Q. B. 116; *Mitchell v. R.*, 1890, 6 T. L. R. 181, 332); for an increase of a superannuation allowance (*Cooper v. R.*, 1880, 28 W. R. 611); damages for an infringement of a patent right (*Feather v. R.*, 1865, 6 B. & S. 257; and see *Dixon v. Small Arms Co.*, 1876, 1 App. Cas. 632); repayment of income tax (*Holborn Viaduct Land Co. v. R.*, 1841, 5 J. P. 341); debts due from an Indian reigning prince before the annexation of his province by the East India Co. (*Frith v. R.*, 1872, L. R. 7 Ex. 365); in respect of financial liabilities incurred by a conquered State before the outbreak of the war resulting in its conquest (*West Rand Central Gold Mining Co., Ltd. v. The King*, *supra*); payment, to the persons entitled, of booty granted by the Crown to the Secretary of State for India, in trust for the officers and men of certain forces, and to be distributed according to certain scales and proportions (*In re the Banda and Kirwee Booty*, *Kinloch v. R.*, 1882, W. N. p. 164); lands in a colony which have been vested in the Crown by an Act of the provincial legislature (*In re Holmes*, 1861, 2 John. & H. 527; 70 E. R. 1167; S. C. *nom. Holmes v. R.*, 1861, 8 Jur. N. S. 76).

IV. *Parties to Petitions of Right.*—All subjects of the Crown, entitled to and governed by the common law of England, may present a petition of right (Clode's *Petition of Right*, 35). It is, however, doubtful whether an alien can do so (*ibid.*), save, perhaps, under sec. 20 of the Colonial Stock Act, 1877, 40 & 41 Vict. c. 59, which provides that *any* person claiming to be interested in colonial stock, to which the Act applies, or in any dividend thereon, may present a petition of right in England in relation to such stock or dividend. Whether an infant can present a petition of right, either in person or by next friend, has never been decided, but, *semble*, if he does so in person, it is ground for demurrer (see Manning's *Practice of the Exchequer, Revenue Branch*, p. 86). The petitioner is termed the suppliant, and may, if proceeding under the Petitions of Right Act, 1860, 23 & 24 Vict. c. 34, and in the Chancery Division, sue *in forma pauperis* (Order, February 1, 1862; Morgan's *Chancery Acts and Orders*, 6th ed., p. 202; Daniell's *Chancery Practice*, 7th ed., p. 1298). It is, *semble*, wrong to join anyone with the Crown as respondent to a petition of right (*Kirk v. R.*, 1872, L. R. 14 Eq. 558), though, where the object of the petition is to recover real or personal property, third parties in possession, occupation, or enjoyment thereof may, under sec. 5 of the Petitions of Right Act, 1860, 23 & 24 Vict. c. 34, be brought in in manner prescribed by that section (see Clode's *Petition of Right*, pp. 171 *et seq.*).

V. *Within what Time the Remedy by Petition of Right must be Prosecuted.*—The Statute of Limitations does not apply to a petition of right (*Rustomjee v. R.*, 1876, 1 Q. B. D. 487), and the Crown cannot plead it in answer to such a petition, there being no limit of time for the recovery of Crown debts (*ibid.*, and see *Lambert v. Taylor*, 1825, 4 Barn. & Cress. 138; Banning's *Limitation of Actions*, 3rd ed., p. 239; Darby and Bosanquet's *Statutes of Limitation*, 2nd ed., p. 518), as the Crown cannot be bound by or have the benefit of Acts of Parliament which have relation only to the course of procedure between subject and subject (*per* Cockburn, C.J., in *Rustomjee v. R.*, 1876, 1 Q. B. D., at p. 492; and see *Perry v. Eames*, [1891] 1 Ch. 658). The *fiat*, however, was refused, and no relief given, in a case where the petition of right claimed relief

against a forfeiture of a Crown lease or sale for non-payment of rent more than six months after the forfeiture (*Re Brain*, 1874, L. R. 18 Eq. 389). It is expressly provided by the Intestates Estate Act, 1884, 47 & 48 Vict. c. 71, s. 3, that a petition of right shall not be presented in respect of the personal estate of any deceased person, or any part or share thereof, except within the same time as, and subject to the same rules of law and equity in, and subject to which, an action for the like purpose might be brought by or against a subject.

VI. *Form of Procedure by Petition of Right*—(a) *The Petitions of Right Act, 1860*.—A petition of right was always available as a remedy, even where "*Monstrans de droit*" (see MONSTRANS DE DROIT) or "*traverse of office*" (see TRAVERSE OF OFFICE) was likewise applicable (Chitty's *Prerogatives of the Crown*, p. 341). It was not, however, usual to adopt it, under such circumstances, owing to its being more dilatory and costly, than either of the other two remedies above named (Chitty's *Prerogatives of the Crown*, p. 341). Since, however, the passing of the Petitions of Right Act, 1860, 23 & 24 Vict. c. 34, commonly called Bovill's Act, which has simplified the procedure by petition of right, no other remedy is now ever resorted to by a subject against the Crown. This Act does not give any cause of petition or remedy against the Crown which was not previously possessed (*Tobin v. R.*, 1864, 16 C. B. N. S. 310). It may be mentioned that the Act has been applied to Ireland by the Petitions of Right (Ireland) Act, 1873, 36 & 37 Vict. c. 69, while, in many of the colonies and dependencies of the Crown, and notably in Australasia (see *Robertson v. Dumaresq*, 1864, 2 Moo. P. C. N. S. 66; 15 E. R. 827) and Canada (see *R. v. Doutré*, 1884, 9 App. Cas. 745), local Acts and Ordinances have been passed, giving the subject means of redress by petition of right.

(b) *Method of Procedure by Petition of Right before the Petitions of Right Act, 1860*.—The old common-law method of procedure on petition of right is expressly preserved by sec. 18 of the Petitions of Right Act, 1860. As, however, it is now practically obsolete, a very brief reference thereto must suffice. The petition is addressed to the sovereign alone, and it has this peculiarity about it, namely, that a *prima facie* case on oath must be established, *ex parte*, before the petition can be heard at all (*per* Wickens, V.-C., in *Kirk v. R.*, 1872, L. R. 14 Eq. at p. 563). That is to say, the petition is referred to the Lord Chancellor, in the first instance, with the indorsement thereon, "*Let right be done*" (*Moncton v. A.-G.*, 1848, 2 Mac. & G. 402; 42 E. R. 156), and thereupon a commission issues to ascertain the facts upon which the suppliant's claim is founded, unless the Attorney-General should be willing to admit the facts, and take issue upon them by demurrer (*Baron de Bode v. R.*, 1845-1851, 6 St. Tri. N. S. 237; *Kirk v. R.*, 1872, L. R. 14 Eq., at p. 563). Where the petition was not, by special indorsement thereon, remitted to a particular Court for investigation, it formerly went to the Court of Chancery (*In re Perry*, 1837, 2 Mee. & W. 873; Stamford's *Prerog.*, c. 22), and will now, *semble*, be assigned to the Chancery Division (Judicature Act, 1873, s. 34). After the return of the commission, the Attorney-General is at liberty to plead in bar, and the merits are determined as between subject and subject (3 Black. Com., p. 276). The judgment, if against the Crown, is known as *amoveas manus* (*ibid.*); if for the Crown "that the suppliant take nothing by his petition" (*Baron de Bode v. R.*, 1845-51, 13 Q. B., at p. 380; S. C. 6 St. Tri. N. S. 237). Error lies upon the judgment for the Crown (*Baron de Bode v. R.*, *supra*).

(c) *The New Procedure under the Petitions of Right Act, 1860.*—The new procedure under the Petitions of Right Act, 1860, 23 & 24 Vict. c. 34, requires more detailed notice. As appears from the preamble the object of this statute is to assimilate the proceedings relating to petitions of right “as nearly as may be to the course of practice and procedure now in force in actions . . . between subject and subject;” and it is subsequently provided, by sec. 7, that the practice and course of procedure in such actions shall extend to petitions of right, so far as applicable; see *Tomline v. R.*, 1879, 4 Ex. D. 252; while the Statute Law Revision and Civil Procedure Act, 1881, 44 & 45 Vict. c. 59 (which by sec. 3 repeals sec. 15 of the Petitions of Right Act, 1860), extends by sec. 6 to all proceedings by or against the Crown the enactments relating to the making of rules of Court contained in the Judicature Act, 1875, and Acts amending the same. No mention is made in the Judicature Acts or Rules of petitions of right, but nevertheless, they certainly to some extent apply thereto, as, for example, Order 34, r. 1, of the R. S. C., which enables a special case to be stated (see *Crossman v. R.*, 1887, 18 Q. B. D. 256); while, on the other hand, they do not prevent a demurrer to a petition of right being put in by the Attorney-General on behalf of the Crown (*Northam Bridge Co. v. R.*, 1886, cited in *Clode’s Petition of Right*, p. 94; *In re the Banda and Kirwee Booty*, *Kinloch v. R.*, 1884, W. N. 80; *West Rand Central Gold Mining Co. v. Rex*, [1905] 2 K. B. 391; *Seton on Judgments*, 6th ed., p. 398), though by Order 25, r. 1, of the R. S. C., demurrers are abolished, and it is, *semble*, doubtful whether the procedure under a summons for directions prescribed by Order 30, R. S. C., is applicable to a petition of right (*Yearly Practice of Supreme Court*, 1907, p. 439). Moreover, the General Order of February 1, 1862, regulating proceedings in Chancery under the Petitions of Right Act, 1860, and made under sec. 15 thereof, since repealed, is not, it seems, annulled (*Seton on Judgments*, 6th ed., p. 398; *Morgan’s Chancery Acts and Orders*, 6th ed., p. 202; *Annual Practice*, 1908, p. 732), being, apparently, preserved by sec. 21 of the Judicature Act, 1875, which saves existing procedure of Courts, where not inconsistent with the Act or Rules. By virtue of Judicial (Officers) Act, 1879, and Order 61, r. 1 (Scheme), the practice as to Petitions of Right is transferred to Central Office of the Supreme Court (see *Annual Practice*, 1908, p. 732). A petition of right may be intitled in the King’s Bench Division, or in the Chancery Division of the High Court of Justice (Petitions of Right Act, 1860, s. 1; Judicature Act, 1873, s. 34), or in the Probate, Divorce, or Admiralty Division, if the subject-matter of the petition, or any material part thereof, arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognisable in a Prize Court within the King’s dominions if the same were a matter in dispute between private persons (Naval Prize Act, 1864, 27 & 28 Vict. c. 25, s. 52; Judicature Act, 1873, s. 34; *Yearly Practice of Supreme Court*, 1907, p. 653). If the petition be intitled in the Chancery Division it will be assigned to a judge, by ballot, in the usual way; if in the King’s Bench Division the place of trial is fixed by a Master of the Supreme Court, on summons (*Annual Practice*, 1908, p. 732). Under secs. 3 and 4 of the Petitions of Right Act, 1860, the Lord Chancellor, on the application of the Attorney-General, may change the Court in which the petition shall be prosecuted *or the venue for the trial of the same*. There is now no local venue (R. S. C., July 1902, Order 36, r. 1), but probably it will be held that, under sec. 7 of the Petitions of

Right Act, the judge in chambers has a concurrent jurisdiction with the Lord Chancellor to fix the place of trial (*Yearly Practice of Supreme Court*, 1908, p. 440). As regards the form of the petition, which may be either written or printed (though, if written, a print must also be filed, *Annual Practice*, 1908, p. 732), it must be addressed to the Sovereign in the form or to the effect prescribed by the Petitions of Right Act, 1860 (schedule, Form 1), and should state the Christian and surname and usual place of abode of the suppliant, and of his solicitor, if any, by whom the same is presented, and must set forth, with convenient certainty, the facts entitling the suppliant to relief, and must be signed by such suppliant, his counsel or solicitor (Petitions of Right Act, 1860, s. 1). A petition of right is not a pleading in the ordinary acceptation of the term; but it is framed in the most general terms, like an article in a newspaper (*per* Willes, J., in *Tobin v. R.*, 1864, 32 L. J. C. P., at p. 224; S. C. 16 C. B. N. S. 310). It must, however, state *the whole* of the title or titles or claim of the Crown (*Chitty's Prerogatives of the Crown*, p. 245; Bacon's *Abr.*, "Prerogative," pp. 478, 479). Moreover, in framing the petition, it is important to remember what has already been stated as to the circumstances under which this remedy lies, and that now, by express enactment, the relief to which a suppliant under the Petitions of Right Act, 1860, is entitled "shall comprehend every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise" (Petitions of Right Act, 1860, s. 16). If the suppliant is a British subject, it should be so stated in the petition (Clode's *Petition of Right*, p. 35), and also, *semble*, if it be the case, that the matters occasioning the petition arose out of England (*Rustomjee v. R.*, 1876, 1 Q. B. D. 487; Clode's *Petition of Right*, p. 160). The petition concludes, in the usual manner, with a prayer for relief, which should be "*special*" and not "*general*" (Clode's *Petition of Right*, p. 161), as in *Rustomjee v. R.*, *ubi supra*; *James v. R.*, 1874, L. R. 17 Eq. 502, 503; *In re Gosman*, 1880, 15 Ch. D. 67; and *In re Brain*, 1874, L. R. 18 Eq. 389, 392. The petition must be signed by the suppliant, his counsel or solicitor (Petitions of Right Act, 1860, s. 1), and afterwards left at the Home Office for the *fiat* of the Crown "*that right be done*" (Petitions of Right Act, 1860, s. 2). The granting of the *fiat* is an act of grace (*per* Erle, C.J., in *Tobin v. R.*, 1863, 14 C. B. N. S., at p. 521; *Irwin v. Grey*, 1862, 3 F. & F. 635), and without such *fiat* there is no jurisdiction to order the petition to be set down for trial (*In re Mitchell*, 1896, 12 T. L. R. 324, 458). The petition should also be sealed with the Home Office seal, and afterwards filed at the Writ, etc., Department, Central Office (*Annual Practice*, 1907, p. 708). The fees on filing are, for the original petition, £1 (impressed); copies for service, 5s. each (*ibid.*). One sealed copy is also required to be left at the office of the Treasury Solicitor, with the following indorsement:—"The suppliant prays for a plea or answer on behalf of His Majesty within twenty-eight days after the date hereof, or otherwise that the petition may be taken as confessed," which should be dated and signed (Petitions of Right Act, 1860, s. 3, schedule, Form No. 2). The petition is then transmitted, by the Treasury Solicitor, to the particular department to which the subject-matter of such petition may relate, to be duly prosecuted in the Court in which the same shall be intituled (*ibid.*, s. 3). As regards service of the petition on persons other than the Crown, in cases where the suppliant

claims to recover real or personal property, or any right in or to the same, the practice is regulated by sec. 5 of the Petitions of Right Act, 1860, according to which a sealed copy of the Petition of Right should be served on or left at the dwelling-house of the person in the enjoyment of the property or right indorsed with a notice to appear "within eight days," and to "plead, answer, or demur" within fourteen days (see *Annual Practice*, 1908, p. 732; and see further, sec. 5, Petitions of Right Act, 1860). The Crown has twenty-eight days for answering, pleading, or demurring to the petition, or such further time as shall be allowed by a Court or a judge (Petitions of Right Act, 1860, s. 4), and may, by or in the name of the Attorney-General, and without leave, plead and demur, reply and demur, or in any other way plead double (*per Williams, J.*, in *Tobin v. R.*, 1863, 14 C. B. N. S., at p. 512; Petitions of Right Act, 1860, s. 6), but cannot set up the Statute of Limitations, which does not apply to a petition of right (*Rustomjee v. R.*, 1876, 1 Q. B. D. 487, 490). Discovery of documents may be obtained by the Crown in support of its case (*Tomline v. R.*, 1879, 4 Ex. D. 252), though, *semble*, it cannot be compelled to give discovery to a subject (*Thomas v. R.*, 1874, L. R. 10 Q. B. 44; *A.-G. v. Newcastle-upon-Tyne Corporation*, [1897] 2 Q. B. 384; *Annual Practice*, 1908, p. 385). In case of default on the part of the Crown, or of any third party brought in under sec. 5 of the Petitions of Right Act, 1860, to answer or plead to the petition, an order may be obtained that the petition be taken as confessed, and leave given to sign judgment in favour of the suppliant (Petitions of Right Act, 1860, s. 8). The judgment, for or against the suppliant, is in the form prescribed (Petitions of Right Act, 1860, s. 9). If it is against the Crown, it possesses such and the same effect as the old judgment of *amoveas manus* (*ibid.*, s. 10), and is certified to the Treasury or Treasurer of the Household (*ibid.*, s. 13), except in cases under the Colonial Stock Act, 1877, 40 & 41 Vict. c. 59, to which a special provision contained in sec. 20 thereof applies. With regard to costs recoverable by or against the Crown, see secs. 11 and 12 of the Petitions of Right Act, 1860, and, as to satisfaction of judgment and costs, sec. 14. On the subject of appeals, the Petitions of Right Act, 1860, provides that the existing laws and statutes, practice and course of procedure in regard thereto, shall, so far as the same may be applicable, apply to petitions of right.

[*Authorities.*—All the principal authorities are mentioned in the text.]

Petition of Right (1628).—During the first session of the third Parliament of Charles I. (1627-1628) the Commons, induced by illegalities committed by or on behalf of the King, determined, at the instance of Coke, to "put up a petition of right." After discussions with the Lords, and an attempt to evade assent by the King, the statute was passed, known as the Petition of Right, 1628 (3 Car. I. c. 1). It consists of eight clauses, aimed at grievances grouped under four heads—(a) Illegal exactions; (b) arbitrary imprisonment; (c) BILLETING of soldiers and marines; (d) MARTIAL LAW.

The petition recites the Statutum de Tallagio non Concedendo (Edw. I.) as an authority for the proposition that no talliage or aid should be laid or levied by the King without the assent of the archbishops, bishops, earls, knights, burgesses and other freemen of the commonalty of the realm. Whether this "statutum" was in fact a

statute or not is not by any means clear, but this recital has the effect of giving it statutory authority, even if it did not possess it before. The petition further recites a statute of Edward III., enacting that no person shall be compelled to make loans to the Crown. The Great Charter and a statute (28 Edw. III.) are cited on the question of arbitrary imprisonment, whilst the Charter and 25 Edw. III. are prayed in aid of relief against the illegal enforcement of martial law. The petition proceeds to recite breaches of these statutes. The remedies prayed for and finally granted by the Crown, were that (i.) no man should be compelled to make or yield any gift, loan, benevolence, tax, or such like charge without common assent by Act of Parliament; nor (ii.) be called to make answer or take oath, or to give attendance, or be confined or otherwise molested or disquieted for refusal to make the loan or benevolence; nor (iii.) be imprisoned or detained without cause showed, only under justification of the King's special command; also (iv.) removal of the soldiers and mariners which were billeted on the inhabitants without legal warrant; also (v.) revocation of commissions of martial law, and that no such commissions should issue in future. See *Ex parte Marais*, [1902] A. C. 109.

Petitions, Parliamentary.—The right of petitioning the Crown and Parliament, for redress of grievances, is an acknowledged fundamental principle of the Constitution, which has been uninterruptedly exercised from the earliest times. Before the constitution of Parliament had assumed its present definite form, and while its judicial and legislative functions were ill-defined, petitions were presented to the Crown, and to the great councils of the realm, for the redress of such grievances as were beyond the jurisdiction of the common law; of which there are examples in the Tower of the date of Edward I.; up till when it is supposed that the aggrieved parties appeared in person before the great council, or before inquests in the country composed of officers appointed by the Crown. If it be assumed, as it is by some, that the separation of the Lords and Commons into two distinct Houses took place in the reign of Henry III., these petitions appear to have been addressed to the Lords alone; if, as others assert, in the seventeenth year of Edward III., they must have been addressed to the whole body then constituting the High Court of Parliament. However this may be, it is certain that, from the reign of Edward I. until the last year of that of Richard II., there are no petitions addressed exclusively to the Commons. During this period, petitions were, with rare exceptions, for redress of private wrongs, and were tried in a judicial rather than a legislative manner, by auditors or triers, who were committees of prelates, peers, and judges, who examined the petitions, and, if no redress was available at common law, sent on the matter for settlement by the High Court of Parliament. Petitions were received in the first place by officers appointed thereunto, usually the Masters in Chancery, who sat in some public place accessible to the people, and transmitted them to the triers. The functions of both the receivers and triers have long since been superseded by the immediate authority of Parliament at large; though (excepting that no lords spiritual were in later times appointed) their appointment at the opening of every Parliament was continued by the House of Lords without interruption down to 1886. In the reign of Henry IV. a great number of petitions began to be addressed to the House of Commons, but the jurisdiction of the Court

of Chancery had in the meantime provided remedial relief to the subject, and petitions were now more in the nature of private bills than applications in respect of private wrongs; indeed, the orders of Parliament made upon them can only be regarded as special statutes of private or local application. As the legislative and judicial limits became more distinct, petitions applied more distinctly for legislative remedies, and were preferred to Parliament through the Commons; but in passing private bills, Parliament has retained the mixed judicial and legislative character of ancient times. In later times, petitions were examined in the Lords, in the manner above described, or by committees of a similar character; and in the Commons, by a committee of grievances and other specially appointed committees; but, since the Commonwealth, in the case of both Houses, by themselves in the first instance; only being referred in particular cases to committees. In early times, all petitions prayed the redress of some specific grievance; but, after the Revolution of 1688, the present practice of petitioning, in respect of general measures of public policy and concern, was gradually introduced.

By the 5th clause of the memorable Declaration, delivered by the Lords and Commons to the Prince and Princess of Orange, February 13, 1688, and afterwards enacted in Parliament as the Bill of Rights, it was declared: "That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal;" and this right is recognised in the statute itself (1 Will. & Mary, sess. 2, c. 2) as among the "true, antient, and indubitable rights of the people of this kingdom;" and again reasserted in the Act of Settlement (12 & 13 Will. III. c. 2).

The existing practice as regards petitions may be considered under three divisions, viz.—(1) their form; (2) their character and substance; (3) their presentation.

(1) Petitions should be written on parchment or paper (for a printed or lithographed petition will not be received by the Commons) in the English language or with a translation certified by the presenting member to be correct, free from interlineation or erasure, signed by the petitioner (not by an agent, except in case of incapacity), and at least one signature should be on the same sheet or skin as the petition, without any other document annexed; if that of a corporation aggregate, under their common seal; and, if to the Lords, superscribed "To the Right Honourable the Lords spiritual and temporal in Parliament assembled;" if to the Commons, "To the Honourable the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled," followed by a general description of the party or parties to the petition, viz., "The humble petition of sheweth." At the conclusion of the allegations follows the "prayer," expressing the object of the petition, ending with the formal words, "and your petitioners, as in duty bound, will ever pray, etc.;" to which are added the signature or marks of the parties. The omission of a prayer is a fatal flaw, *i.e.* a document in the style of a declaration, an address of thanks or remonstrance, without a form of prayer, will not be received.

Any forgery or fraud in the preparation or signature of petitions is punished as a breach of privilege, and the petition rejected, if so decided.

(2) Petitions should be respectful and temperate in their character, free from disrespect either to the Sovereign, or to Parliament, or to the

Courts of Justice or other tribunals or constituted authority; and, if objected to on such a ground, should be read at the table of the House, and are liable to be not allowed to lie on the table; may not allude to debates in either House, nor to intended motions, if merely announced in debate; though otherwise after notices of motions formally given, and, in the Lords, petitions relating to a bill still pending in the Commons, or already rejected there, will not be received.

(3) Petitions must be presented by a member of the House to which they are addressed (signed by him at the beginning); in the case of the corporation of the City of London, by the sheriffs at the bar, or by one sheriff only, if one be a member or unavoidably absent; or, if both are absent, by the Lord Mayor, an alderman, and some of the common council; so also in the case of the corporation of the City of Dublin. A member petitioning himself must get some other member to present it. Petitions may be forwarded to members by post; should be read by them before presentation; and, if in breach of any rule of the House, in his opinion or that of the Speaker, returned; when read, it is for the House to permit or forbid their lying on the table, or to reject them.

On presenting the petition, the member may, if he wish, read its prayer and make a general statement as to its source and nature, or the clerk may read it at the table; and, if a present personal grievance, demanding as an urgent necessity immediate remedy, be raised therein, discussion may at once take place. All other petitions, when laid on the table, are referred to the Committee on Public Petitions, and directed to be classified, analysed, and printed, when necessary at length, with details as to their number, objects, and the number of the signatories.

[*Authority*.—May's *Parliamentary Practice*, 11th ed., chap. xx.]

Peto's Act.—By this name is popularly known the 13 & 14 Vict. (1850) c. 28, to which, by 55 & 56 Vict. (1892) c. 10, the short title of "The Trustee Appointment Act, 1850," has been given. It relates to the tenure of property by societies for religious and educational purposes, and was intended, as its preamble states, to render more simple and effectual the titles by which congregations or societies associated together for the purposes of maintaining religious worship or promoting education in England, Wales, and Ireland, may hold the property required for such purposes. In accordance with its provisions, property conveyed for the above-mentioned purposes shall vest without conveyance in the successors in office of retiring or deceased trustees, who shall on their appointment (which must be by deed under hand and seal of the chairman of the meeting of trustees appointing them, executed in presence of such meeting) at once, without further act, step into the shoes of their predecessors (ss. 1, 3). Provision is also made, in the case of copyholds, for the periodical payment of fines in lieu of fines on death and alienation, these being made payable on the first appointment of a new trustee, and thereafter on the expiration of every period of forty years (s. 2). In order for the Act to apply there must be property acquired by the society or congregation and held in trust for them. Where the trustees of a Wesleyan chapel have other duties to perform (*e.g.* as members of the governing body of the district) the case does not come within the Act (*Re Hoghton Chapel*, 1853, 2 W. R. 631). It has been held that a lease for the purpose of a chapel under this Act is a

lease for a charitable purpose, which therefore had to be enrolled under the Mortmain Act, 1735, 9 Geo. II. c. 36 (now repealed) (*Bunting v. Sargent*, 1879, 13 Ch. D. 330).

Peto's Act must be read in connection with the Trustees Appointment Act, 1890, 53 & 54 Vict. c. 19, which by sec. 2 extends its application to—(1) Places of religious worship; (2) the endowment of such places and the ministers thereof; (3) burial-grounds (see also 32 & 33 Vict. (1869) c. 26); (4) places for the education and training of students; (5) schoolhouses generally (see also 15 & 16 Vict. (1852) c. 49); and (6) residences for ministers, schoolmasters, caretakers, etc., whenever the land is held by trustees in connection with any society or body of persons comprising several congregations associated together for religious purposes. In all the cases above specified the vesting clause of Peto's Act applies (s. 4).

Petroleum.—See EXPLOSIVES.

Petty Bag Office.—Prior to 1874 an office of this name was attached to the common-law jurisdiction of the Court of Chancery for suits for and against solicitors and officers of that Court, and for proceedings relating to statutes, recognisances, writs of *scire facias*, petitions *monstrans de droit*, applications to cancel letters patent, traverses of office and the like. It was distinguished from the Hanaper Office (as to which, see 5 & 6 Vict. (1842) c. 103), because the writs and returns to them in Crown matters were in former times preserved in a little sack or bag (*in parvâ bagâ*), whereas writs relating to the business of the subject were originally kept in a hamper or big basket (*in hanaperio*). By the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 16, the common-law jurisdiction of the Court of Chancery was transferred to the High Court of Justice, and by 37 & 38 Vict. (1874) c. 81, s. 5, the office of clerk of the Petty Bag was abolished. The latter's duties and powers (except such as are by the Solicitors Act, 1888, 51 & 52 Vict. c. 65, directed to be performed by the Incorporated Law Society) are now vested in the senior clerk of the Crown Office Department of the Central Office (R. S. C., January 30, 1889). See further, ERROR, WRIT OF; CROWN OFFICE; PROHIBITION.

Petty Constables.—See CONSTABLE.

Petty Jury.—See JURY.

Petty Serjeanty.—See TENURES.

Petty Sessional Court is defined by sec. 13 (11) of the Interpretation Act, 1889, 52 & 53 Vict. c. 63, as a Court of summary jurisdiction, consisting of two or more justices when sitting in a petty sessional court-house, and as including the Lord Mayor of the City of London, and any alderman of that city and any metropolitan or borough police magistrate when sitting at a court-house or place at which he is authorised by law to do alone any act authorised to be done by more than one justice of the peace.

See INFERIOR COURTS, Vol. VII. p. 178; MAGISTRATE; METROPOLITAN POLICE DISTRICT; PETTY SESSIONS.

Petty Sessional Division is a district for which petty sessions are or can be held. Inasmuch as the justices were not entitled to subdivide themselves according to districts or areas without the assent of the general body, a system of allotted districts or divisions was created in the eighteenth century (*R. v. Devon Justices*, 1818, 1 Barn. & Ald. 588).

The creation of the divisions does not, as a general rule, in any way restrict the right of a petty sessional Court therein sitting to adjudicate on a matter arising in any part of the county, whether it be civil or criminal, and whether in the latter case it is indictable or may be summarily punished (*R. v. Beckley*, 1887, 20 Q. B. D. 187). But in certain instances a matter is cognisable by statute only in the petty sessional division in which it arises or the complainant or defendant is resident (*q.v.*) **BASTARDY**; **LICENSING**. Paley, *Summary Convictions*, 8th ed., p. 42.

On the passing of the Local Government Act, 1888, and the creation of the new county of London, the petty sessional divisions in the transferred portions of Middlesex, Surrey, and Kent were left outstanding as divisions of London, but are subject to alteration by the Quarter Sessions of London (51 & 52 Vict. c. 41, s. 42); and petty sessional divisions exist within the area in which unpaid justices act, besides the police Court districts for which police magistrates act. See **METROPOLITAN POLICE DISTRICT**.

Prior to 1828 there does not seem to have been a complete, regular, and consistent system of dividing counties into districts for petty sessions. By the Division of Counties Act, 1828, 9 Geo. IV. c. 43, county Quarter Sessions were empowered to create such districts. The procedure for division is regulated by the Act, subject to the limitation that a new division must not be created which has not at least five resident justices (9 Geo. IV. c. 43, s. 5; 6 & 7 Will. IV. c. 12, s. 2). Divisions once created may not be altered within three years (9 Geo. IV. c. 43, s. 10; 6 & 7 Will. IV. c. 12, s. 1). The limits of divisions created are judicially noticed by Quarter Sessions (*R. v. Whittles*, 1849, 13 Q. B. 548).

In constituting or altering divisions, Quarter Sessions may, if it is convenient, divide parishes, townships, tithings, or places, and make the necessary and incidental changes with reference to parochial officers (22 & 23 Vict. c. 65, ss. 1, 2).

Where a borough has a separate commission of the peace, it is *ipso facto* a petty sessional division (12 & 13 Vict. c. 18, s. 1), in which the borough justices and the county justices have concurrent jurisdiction, unless it has a separate Court of Quarter Sessions, in which event the borough, if exempt from the county justices (under a non-introumittant clause), remains exempt (45 & 46 Vict. 50, ss. 154, 158; *Buckler v. Wilson*, [1896] 1 Q. B. 83; *R. v. Gloucester JJ.*, 6 N. & M. 115).

Petty Sessions.—1. Besides the general or Quarter Sessions of justices of the peace, which are in theory held before the whole body of justices named in the commission of the peace, there have been established by statute what are termed petty sessions for dealing summarily with offences and matters not deemed of sufficient importance for the full bench. This jurisdiction seems first to have been given under the statutes as to labourers and vagrants and the poor law. The nature of petty sessions, as distinguished from quarter and special sessions, has already been considered under **INFERIOR COURTS**, Vol. VII.,

at p. 178. They were instituted to enable justices to deal with minor offences and matters where they arose, and to obviate the need of going to the full bench (see 9 Geo. iv. c. 43, Preamble).

A petty sessional Court is a Court of summary jurisdiction consisting of two or more justices of the peace, or of a borough stipendiary magistrate, or a metropolitan police magistrate, or the Lord Mayor or any alderman of the City of London, to whom jurisdiction is given, or who is authorised to act under the Summary Jurisdiction Acts (*R. v. Whittles*, 1849, 13 Q. B. 248) or any other Act, or under his commission (52 & 53 Vict. c. 63, s. 13). This definition does not include the acts of justices sitting to deal summarily with indictable offences, nor their acts as to any matter directed to be dealt with at special sessions nor with respect to the grant, refusal, or renewal of liquor licences (see *Boulter v. Kent JJ.*, [1897] A. C. 556). The annual licensing meeting for each petty sessional division is fixed at petty sessions (1828, c. 61, s. 1) and protection orders may be granted by a petty sessional Court (5 & 6 Vict. c. 44, s. 1; 33 & 34 Vict. c. 29, s. 4; 35 & 36 Vict. c. 94, s. 41).

The Court, to be properly constituted, must sit at a petty sessional court-house, *i.e.* a place regularly set apart for the petty or special sessions of the justices, or for the time being appointed as a substitute for it, or at an occasional court-house, *i.e.* a police station or other place previously appointed by the justices to be used as an occasional court-house (1848, c. 43, s. 12; 1879, c. 49, s. 20; 1889, c. 63, s. 13).

Where the Court proposes to deal summarily with an indictable offence further notice must be given of its sitting for the purpose (1879, c. 49, s. 20 (8)).

Petty sessions include any meeting of justices within the limits and by virtue of their commission to transact such business as they are competent to transact there, which is not a general quarter or special sessions (*R. v. Whittles*, 1849, 13 Q. B. 248, 254). The court-house need not be within the limits of the petty sessional division for which the sessions are held, nor in the county for which the justices are acting (1884, c. 43, s. 8), and petty sessions for Middlesex, Kent, or Surrey may, if convenient, be held in the county of London (1888, c. 41, s. 42 (12)).

The provision of justices' rooms or court-houses in boroughs having a separate commission of the peace is in the hands of the town council (12 & 13 Vict. c. 18, s. 2; 45 & 46 Vict. c. 50, s. 160), and in counties is in the hands of the joint committee of the Quarter Sessions and the County Council (51 & 52 Vict. c. 41, ss. 3 (iv.), 30).

Petty sessions may not be held in premises licensed for the sale of intoxicants, or in any room, licensed or not, in any building licensed for the sale of intoxicants (2 Edw. vii. c. 28, s. 21 (general); 45 & 46 Vict. c. 50, s. 160 (boroughs)) (see *Jones v. Jones*, 1885, 50 J. P. 180).

The places may be hired or otherwise provided (12 & 13 Vict. c. 18, s. 2). This involves powers (1) to acquire land and erect a proper court-house thereon, and to raise money by loan or otherwise to defray the cost out of the county or borough rate (42 & 43 Vict. c. 49, s. 30); (2) to contract with the treasurer of the local County Court for its use as a petty sessional Court (12 & 13 Vict. c. 18, s. 2).

Counties may (1) combine with other counties or boroughs for hiring or providing court-houses at or near their common boundary at joint expense; or may (2) contract for the use of those belonging to other

counties or boroughs, which are to be treated as within the jurisdiction of each contracting authority (12 & 13 Vict. c. 18, s. 3; 31 & 32 Vict. c. 22, ss. 5, 8); and see LOCK-UP HOUSE.

2. The jurisdiction of petty sessional Courts may be described as covering the whole of the judicial functions of a Court of summary jurisdiction, with power to do judicial acts as to which a single justice has not jurisdiction. Justices in petty sessions can undoubtedly act under the Indictable Offences Act, 1848. This subject is dealt with as to the distinction between petty and special sessions under INFERIOR COURTS; as to prosecutions, under PROSECUTION; and as to SUMMARY JURISDICTION, under that title.

Petty Treason.—See TREASON.

Pews.—*Meaning of the Word.*—The word pew is now generally used to mean an enclosed seat in a church. Properly, however, it only means a church seat or stall. Various etymological derivations have been suggested, but none can be considered satisfactory. On this subject, see Heales, *History and Law of Church Seats and Pews*, i. pp. 23-29). In the present article it is proposed to treat the general law as to seats in church.

HISTORICAL SUMMARY.

In early times churches appear not to have been provided with seats for the congregation. In fact, down to the close of the fourteenth century there do not appear to have been any seats in the naves and aisles of churches. Prior to that time, however, seats were provided in the church for the clergy, the patron of the church, and in some cases for men of noble birth (see Decrees of the Synod of Exeter, 1287, Wilkins, *Concilia*, vol. iv. p. 140), and it has been conjectured that the stone benches or tables and the walls sufficed for the aged and infirm. All the inhabitants of a parish had a customary right to attend church; and the view of the law expressed in *Fitzwalter's Case*, 1493 (*Year-Book*, Easter Term, 8 Hen. VII. case No. 4, fol. 12), was that the church is common to everyone; and therefore it is not reasonable that one should have his seat and that two shall stand, for no place belongs more to one than another. It however appears, from this case and from other evidence, that there were at this period a few fixed seats in churches, which were held by prescription, which seats may have been fixed. Seats were gradually introduced in the fifteenth and the sixteenth centuries, and even at this early date the churchwardens seem to have made a charge in respect to them. The seats were for the most part only moveable seats or stools, and any person had a right to remove such seats and stools for his own ease and standing (*Fitzwalter's Case*, *supra*). From a historical point of view, it is exceedingly doubtful if the earliest appropriations of seats were ever authorised by authority. The jurisdiction over the fabric of the church belongs to the ordinary, and is therefore subject to ecclesiastical jurisdiction, except in matters involving a claim to a right by prescription. Whatever its origin, however, the Courts have, as already mentioned, recognised from the fifteenth century an exclusive right to a pew or seat in the church on the ground of prescription. However, in a case in Charles the First's time (1632), before the High Commission, relating to seats in "St. Austin's near Paule's gate," Archbishop Laud, then Bishop of London, denies the possi-

bility of any title to a seat in church by prescription. "What then is your tyme out of minde. For tyme was when there were noe seates in any church among us." Cases in the Court of Star Chamber and High Commission, *Camden Society's Publications*, p. 297. The large enclosed boxes, often described as the squire's pew, are supposed to have been the successors of the old chantry (pareloses) which originally contained an altar and kneeling place for the founder of the church and his wife, which were used after their deaths by their descendants. From the later part of the sixteenth century the ecclesiastical Courts commenced to grant faculties to persons for permission to erect seats. The earliest instance is met with at Worcester, 1580, and the first in London in 1594. After that date they were frequently granted. They seem originally to have been made to enable persons of position in the parish to build seats for the accommodation of themselves and their families, and to confirm them in the possession of seats which they had erected without authority. No particular system seems to have been observed in making these grants. The idea, however, may be traced in the decisions of the Courts, that vacant spaces in a church might be occupied so long as no person was thereby damaged; that persons should be placed in church according to their social degree, and that seats enjoyed by the former owner of an ancient house should be enjoyed by the present owner. It should be added that the custom of families sitting together in the same pew or seat is a modern innovation, the general custom, down to the middle of the seventeenth century, being for the sexes to sit on different sides of the church. From the time of William III., in churches built under private Acts of Parliament, payment for pews was legalised under certain conditions, and the same principle was partially adopted in churches built under the Church Building Acts (see *post*).

It thus appears that, historically, the rights of the inhabitants of a parish to seats in church are restricted only by private rights to sittings acquired by prescription or by faculties.

Jurisdiction of the Ordinary and Churchwardens in Respect to Seats.—While all the inhabitants of the parish have the right and are bound to attend church, and are there entitled to be accommodated, the power to appoint in what seats they shall sit rests with the ordinary, at least so far as the nave or body of the church is concerned (as to seats in the aisle and chancel, see articles AISLE; CHANCEL). This jurisdiction he generally exercises through the churchwardens. Excepting in cases of prescription, or where persons are excluded for whom there is standing room (*Taylor v. Timson*, 1888, 20 Q. B. D. 671), the Common Law Courts will not interfere with the "placing of the parishioners," as the matter is "merely spiritual" (*Corven's Case*, 1604, 12 Coke Rep. 105). It has been stated that in some places the churchwardens can dispose of seats independently of the ordinary, but there does not appear to be any authority for this view. (See on this subject, *Presgrave v. Churchwardens of Shrewsbury*, 1705, 1 Salk. 166; and also *Com. Dig.*, "Esglisse" (G. 3), and article CHURCHWARDEN.)

In arranging the sittings, it is the duty of the churchwardens, as the officers of the ordinary, to seat all the parishioners, who are entitled to be seated orderly and conveniently. (See observations of Sir Robert Phillimore, Dean of Arches, in *Ritchings v. Cordingley*, 1870, L. R. 3 A. & E. 113, at p. 119.) Their main duty is to look to the general accommodation of the parish, consulting, as far as may be, the interests all the inhabitants. The parishioners have a claim to be seated according to their rank

and station; but the churchwardens ought not, in providing for this, to overlook the claims of all parishioners to be seated, if sittings can be provided for them; and they should not accommodate the upper classes beyond their real wants in such a way as to inconvenience their poorer neighbours. Neither the vestry nor the incumbent have, properly speaking, any right to interfere with the discretion of the churchwardens in arranging or re-arranging the sittings, but the churchwardens, to a certain extent, reasonably defer to the wishes of both. (See judgment of Sir John Nicholl in the Arches Court of Canterbury in *Fuller v. Lane*, 1825, 2 Add. 419; see also *Blake v. Osborne*, 1832, 3 Hag. 726; *Phillips v. Halliday*, 1891, A. C. 228; 1884, 23 Q. B. D. 48.)

A person who is not a parishioner, though the place in which he lives is extra-parochial, or has ceased to be a parishioner, has no right to a seat (except perhaps he can make out a claim by prescription) (*Byerley v. Windus*, 1826, 2 B. & C. 1).

In churches with free seats, churchwardens, for the maintenance of order and decorum, have authority to direct in what parts of the church certain classes of the congregation (*e.g.* boys and girls) may and may not sit (*Asher v. Calcraft*, 1887, 18 Q. B. D. 607).

Every parishioner, as such, has a right to a seat in a parish church, but not necessarily to a pew; and no person who is not a parishioner has any right to a seat in church; and if a parishioner ceases to be such, he loses his right (*In re The Pews of the Cathedral of St. Colum, Londonderry*, 1863, 8 L. T. 861). It would appear from this decision that where cathedrals are parish churches the ordering of the seats in the nave pertains to the churchwardens; but the matter may be possibly affected by the cathedral statutes, and in this particular case the church had been a parochial as well as a cathedral church from the time of its foundation. In cathedrals which are not parish churches the ordinary arranges the seats. No person not excommunicated ought to be excluded from church, who behaves decently (*Walter v. Gunner*, 1798, 1 Hag. Con. 314; *Phillimore, Eccl. Law*, 2nd ed., vol. ii. p. 1424). Where an increase in population renders it necessary, a faculty will be granted for the erection of a gallery to seat the additional numbers (*Groves v. Rector of Hornsey*, 1793, 1 Hag. 188).

A person placed in a particular pew by the churchwardens, or sitting there by their acquiescence, has a right to an action in the ecclesiastical Courts for perturbation of seat against a stranger (*Pettman v. Bridger*, 1811, 1 Phillim. 316); but, apart from seats by prescription or faculties, there is no right on the part of a seatholder to maintain an action against the churchwardens or the ordinary, who may rearrange the sittings as they think fit; and he cannot support a common-law action of trespass. Pew rents (except under statute) and the sale of pews are illegal (*Blake v. Osborne*, 3 Hag. Ec. 726, see p. 733; *Fuller v. Lane*, *supra*). The materials in pews which have been taken down belong to the churchwardens, for the benefit of the parish; and the right of bringing an action against a person wrongfully taking away a pew or seat pertains to the churchwardens, and not to the incumbent.

It is the duty of the parishioners to repair the pews in the body of the church; but since the abolition of church rates the obligation cannot be enforced. It is the duty of churchwardens to see the pews are not built too high (*Gibson v. Wright*, 1604, Noy, 108).

Prescription.—The owner of an ancient messuage may, as has already been stated, claim, by prescription against the ordinary and church-

wardens, the right to a seat in the body of the church, as well as in an aisle or chancel (see further, article AISLE; see also article CHANCEL); and an inhabitant may, in respect of his house, prescribe to the first, second, or third place in the same seat, which has been repaired by him and those jointly that sit with him in it. If their rights are interfered with by the ordinary, the High Court will interfere by prohibition. This prescriptive right is, in the eyes of the law, based on a lost faculty, and must be claimed in respect of a house, and not of lands, in the parish (*Pettman v. Bridger*, *supra*; *Phillips v. Halliday*, *supra*; and [1891] A. C. 228).

It is further necessary to show exclusive user of the pew on the part of the claimant as against the ordinary, inconsistent with mere possession by the permission of the churchwardens. The right to such a pew is subject to the burden of repair; but it is unnecessary to prove actual repair where evidence is forthcoming of other acts of user or assertion of proprietary right (*Churton v. Frewen*, 1866, L. R. 2 Eq. 634; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749, see p. 759).

The claim to a pew is not an easement, and the Time of Prescription Act, 1831-2, 2 & 3 Will. iv. c. 71, does not apply to the claim by prescription to a nave of a pew of a parish church (*Crisp v. Martin*, *supra*); accordingly user during the short periods mentioned in the Act will not be sufficient proof that the pew has been built and repaired by the claimant time out of mind (*Crisp v. Martin*, *supra*; *Halliday v. Phillips*, *supra*; *Phillimore*, *Ecc. Law*, vol. ii. p. 1430, 2nd ed.); and the question whether a lost grant did, as a matter of fact, exist is one which the Court trying the action must decide (*Proud v. Price*, 1893, 63 L. J. Q. B. 61).

Seats by Faculty.—In practice faculties for seats are now rarely granted by the ordinary. When the Court grants a faculty to appropriate a seat in a church to an inhabitant, it should be a matter of preliminary consideration—(1) Whether such a grant would be prejudicial to the parish; (2) whether it would be prejudicial to the persons opposing the grant; (3) whether the person applying for it is from station and property in the parish qualified to have such a grant.

The form of a faculty is to a man and his family so long as they continue inhabitants of a certain house in the parish. The words "of a certain house" are, however, often omitted. In modern times pews are not annexed by faculty to a house (*Partington v. Rector of Barnes*, 1757, 2 Lee 345). The grant by faculty of a pew to a man and his heirs would be bad (*Stocks v. Booth*, 1786, 1 T. R. 428; 1 R. R. 244).

In the case of *Vicar v. Parishioners of Westgate-on-Sea*, [1898] P. 217, Dr. Tristram, as commissary-general of the diocese of Canterbury, expressed the opinion that in a church built under the Church Building Acts the churchwardens in allotting seats might give priority in respect of sittings to parishioners who were prepared to subscribe to a fund for the improvement and repairs of the church.

The Appellate Courts (*viz.*, the Court of Arches and the Chancery Court of York) are reluctant, on grounds of convenience, to interfere in faculties relating to seats (*Woolcombe v. Ouldridge*, 1825, 3 Ad. 1).

Seats under the Church Building and New Parishes Acts.—Under the Church Building Acts provision is made for the letting of seats, fixing and recovery of pew rents, for the payment thereof of the minister's salary, and power given to churchwardens to bring action in their own name, in respect of the same. In regard to churches of this character the position is somewhat different than in regard to ordinary parish

churches, since in some cases the idea of the legislator has been to treat pew rents as a means of providing, wholly or in part, the minister's salary and the expenses of the church (see Church Building Acts, 1818, 58 Geo. III. c. 45, ss. 62, 63, 64, 73, 75, 76, 77, 78, 79; 1819, 59 Geo. III. c. 134, ss. 26-32; 1831, 1 & 2 Will. IV. c. 38, ss. 4, 16, 21). As to these Acts, see Prideaux, *Churchwardens' Guide*, 16th ed., pp. 301-309. Under the Church Building (1851) Act, 14 & 15 Vict. c. 97, when a permanent provision in land or money has been made for a church for which pew rents have been fixed under any of the Church Building Acts, and when the pew rents have not been appropriated under a local Act, the Commissioners may declare that pew rents shall cease, and the seats will in that case be in the same position as those of an ordinary parish church. Under the New Parishes Acts, 1856, 19 & 20 Vict. c. 104, s. 5, every person to whom sittings are assigned in a new church shall surrender his rights to sittings in the church of the old parish or ecclesiastical district. Under sec. 6 pew rents may, with consent of bishop, but only if sufficient endowment cannot be provided, be taken for the maintenance and repair of the church. Under the New Parishes Act, 1869, 32 & 33 Vict. c. 94, pews or sittings may be surrendered to the Ecclesiastical Commissioners; see also Church Seats Act, 1872, 35 & 36 Vict. c. 49; and New Parishes and Church Building Act, 1884, 47 & 48 Vict. c. 65, s. 4. A minister of a church built under the Church Building Acts may bring an action for the recovery of his stipend against the churchwardens when under the Acts a stipend has been duly assigned to him out of the pew rents by the Commissioners acting under the Acts; but the churchwardens are not liable for arrears received by their predecessors (*Lloyd v. Barrop*, 1868, L. R. 4 Ex. 6).

The Church Building Act, 1845, 8 & 9 Vict. c. 70, s. 1, provides that, in cases in which a church is rebuilt or enlarged, the claims of persons entitled to pews or sittings in the old church shall be investigated, and if proved that they shall have sittings in the new church, and these sittings may be appropriated by a commission of disinterested persons living in the neighbourhood and appointed by the bishop, according to the provisions of this statute.

A mortgage by an incumbent of his pew rents is void under the Leases of Benefices Act, 1571, 13 Eliz. c. 20; *Ex parte Arrowsmith*, 1878, 8 Ch. D. 96).

[*Authorities*.—Heales's *History and Law of Church Seats and Pews*; Cox and Harvey, *English Church Furniture* (Antiquary Book Series); Phillimore, *Ecclesiastical Law*, 2nd ed.; Steer, *Parish Law*, 6th ed.; Prideaux, *Churchwardens' Guide*, 16th ed.; Shaw, *Parish Law*.]

Pharmacy Acts; Pharmacopœia.—See APOTHECARY; BRITISH PHARMACOPŒIA; CHEMIST; MEDICAL PRACTITIONER; MEDICINE STAMPS.

Pheasants.—See GAME LAWS.

Photograph.—See COPYRIGHT.

Physician.—See MEDICAL PRACTITIONER.

Picbage.—A consideration paid to the lord of the soil for the breaking up of ground to set up booths, stalls, or standings in fairs (1 Steph. Com., 664; *R. v. Maydenhead*, 1678, Pal. 76).

Picture.—A picture generally consists of three things—first, the canvas on which the picture is painted; secondly, the painting itself, which is painted on the canvas and gives it the value; and thirdly, the frame (Martin, B., *Henderson v. The London and N.-W. Rly. Co.*, *infra*). Picture and frame are to be considered as one article for purposes of the Carriers Act, 11 Geo. iv. and 1 Will. iv. c. 68 (*Henderson (Anderson) v. The London and N.-W. Rly. Co.*, 1870, L. R. 5 Ex. 90; 39 L. J. Ex. 55). The legal use of the word “painting” is the popular one. Whether artistic designs for hangings, paper for walls, muslins, china, etc., are so exquisitely drawn that they may partake of the character of paintings in the popular sense, in addition to their character as designs in a commercial sense, must be a question for the jury (Hawkins, J., *Woodward v. The London and N.-W. Rly. Co.*, 3 Ex. D. 121). In this case it was held that certain painted carpet and rug patterns and painted carpet designs were not paintings or pictures within the Carriers Act.

Where there is nothing to show to the contrary, pictures will pass as part of the furniture of a house (*Kelly v. Powlet*, 1763, Amb. 605; 27 E. R. 393). It has been held that by an absolute bequest of all his jewels, trinkets, gold and silver plate, ornamental and other china, and all objects of vertu or taste, the testator did not intend to bequeath his pictures, but they passed with “the furniture and other effects” (*In re Londesborough*, 1880, 50 L. J. Ch. 9).

A picture may be libellous; a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel (5 Co. Rep. 125a; 77 E. R. 250; *Austin v. Culpepper*, Skin. 123; *Du Bost v. Beresford*, 2 Camp. 511; *Monson v. Tussauds, Ltd.*, [1894] 1 Q. B. 671). In case upon a libel, it is sufficient if the matter is reflecting; as to paint a man playing at cudgels with his wife (Lord Holt, C.J., 11 Mod. 99).

Where framed pictures are sent by a carrier, the frames as well as the pictures are within the Carriers Act (*Henderson v. London and N.-W. Rly. Co.*, 1870, L. R. 5 Ex. 90; *Woodward v. London and N.-W. Rly. Co.*, 1878, 3 Ex. D. 121).

The piracy of a picture or engraving by the process of photography, or by any other process, whereby copies may be indefinitely multiplied, is within the Statutes 8 Geo. II. c. 13; 7 Geo. III. c. 38; and 17 Geo. III. c. 57, for the protection of artists and engravers (*Gambart v. Ball*, 1863, 14 C. B. N. S. 306). The author of an unpublished work of art has an exclusive right to it, and anyone who, however innocently, infringes this right by publication without the owner's consent is liable in damages, as well as to an injunction (*Mansell v. Valley Printing Co.*, [1908] W. N. 41; 24 T. L. R. 311). See generally on the point of copyright in pictures, COPYRIGHT, herein, and Macgillivray on *Copyright*, 1902 ed., chap. viii.

With respect to pictures as heirlooms, see *D'Eyncourt v. Gregory*, 1866, L. R. 3 Eq. 382; see also *Treadwin v. G. E. Rly. Co.*, 1866, 37 L. J. C. P. 83.

As to the liability of pictures to seizure for distress for rent of a building where they are exhibited by the tenant (as proprietor of an Arts Club) to whom they had been sent for exhibition and sale on commission see *Challoner v. Robinson*, [1908] 1 Ch. 49.

Piecework.—In contracts creating a relationship of master and servant, remuneration may be stipulated to be paid not only in proportion

to the period of service, but also in proportion to the work done. Work done under a contract of the latter kind, by the job or piece, is known as piecework. In general, wages will be due for the work done from time to time (*Warburton v. Heyworth*, 1880, 6 Q. B. D. 1), but there is nothing to prevent a servant agreeing to forfeit such earnings in the event of breaking the contract of service without notice (*Walsh v. Walley*, 1874, L. R. 9 Q. B. 367). Thus where a servant did piecework under rules which fixed the amount due on Thursdays, but made the wages not payable until Saturday, and left off work without notice on a Friday, he was held to have forfeited not only what he had earned since the last Thursday, but also what was due to be paid on the Saturday in respect of the preceding week (*Walsh v. Walley*, *supra*); but in another case where the facts were similar, except that the servant was held not to have agreed to the booking rule, forfeiture of what had been earned before the last booking was not allowed, the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90, s. 11, protecting the servant in that case (*Warburton v. Heyworth*, *supra*). So if a weekly hiring is made out, a servant may be made to forfeit what he has earned, even though paid by the piece, if he leaves off work without notice (*Gregson v. Watson*, 1876, 34 L. T. N. S. 143). In many cases, therefore, it is a question of importance whether the arrangement is to do piecework or to work by time, for in the former case an action *quantum meruit* will, as a general rule, lie, while in the latter case much will depend upon the terms of the service. If the whole of a piece of work is to be done, it may be a provision in the agreement that remuneration will be dependent upon completion of the piece (see *Green v. Mules*, 1861, 30 L. J. C. P. 343; *Hulle v. Heightman*, 1802, 2 East, 145; *Cutter v. Powell*, 1795, 6 T. R. 320).

Pie-Poudre, Court of.—See INFERIOR COURTS.

Pier.—The law as to the government of piers generally will be found under HARBOURS. A County Court exercising Admiralty jurisdiction has cognisance of a claim for damage done to a ship by collision with a pierhead, for the Admiralty Court had jurisdiction to entertain such a suit (*The Zeta*, [1893] A. C. 468). Where a pier is damaged by the negligent navigation of a ship, the law applicable to the case is that of the country in which the pier is situated; and if that country be a foreign one, an English Court has no jurisdiction, the injury being done to foreign soil, unless it is given jurisdiction by contract between the parties (*The M. Moxham*, 1876, 1 P. D. 107; and see COLLISIONS AT SEA). Where a vessel coming down the Clyde ran into and injured a pier or quay of a ferry belonging to a private owner, and by Act of Parliament the Clyde Navigation Trustees had been authorised to reconstruct the piers of that ferry, and the quays of the ferry were to be repaired and reconstructed by the trustees where such repair or reconstruction was made necessary by their works for deepening the river, and the trustees had reconstructed those piers, and by another Act their undertaking was to consist of the works specified in the former Act (*inter alia*), and thereby authorised to be made and maintained, it was held that this imposed no obligation on the trustees to repair that damage, the ferry not being part of their undertaking (*Clyde Navigation Trustees v. Lord Blantyre*, [1893] A. C. 703). In a policy of reinsurance protecting the insured from "risk or loss or damage through collision with . . . harbours

or wharves or piers or stages or similar structures," where the vessel insured was driven by the wind and sea against a sloping bank formed outside the breakwater of a harbour by laying down loose boulders in the sea to protect the breakwater, and was totally lost, this was held a loss by collision with a pier or similar structure (*Union M. I. C. v. Borwick*, [1895] 2 Q. B. 279).

As to piers on the Thames, see *London County Council v. General Steam Nav. Co.*, 1907, 10 Asp. 340.

Pigeons.—See BIRDS, Vol. II. p. 265.

Pig Market.—See Diseases of Animals Act, 1894, and *M'Lean v. Monk*, 1898, 77 L. T. 663.

Pillage.—See WAR.

Pillory.—A contrivance for exposing offenders to public scorn, usually consisting of a platform on which was set a wooden post and frame, behind which the offender stood, his head and hands being thrust through and fixed in holes in the frame. It was one of the usual common law punishments from Anglo-Saxon times for misdemeanors, especially cheats and frauds on the public, *e.g.* the sale of unsound food (5 Seld. Soc. Publ. 80), and forestalling and regrating, and during the seventeenth century for political libels and sedition.

The grantee of a franchise to have a court leet or market is said to have been required to provide a pillory and tumbrel for punishment, and the sentence was regarded as involving infamy (3 Co. Inst., 219). Sundry statutes extended the punishment to new offences, *e.g.* perjury (5 Eliz. c. 9, s. 7). The pillory was abolished in 1816 (56 Geo. III. c. 138) for all offences except perjury and subornation of perjury, and in 1837 (7 Will. IV. and 1 Vict. c. 23) was wholly abolished. Where, under any statute, pillory was the sole punishment of an offence, fine and imprisonment were substituted in 1816. In the United States it continued till 1839 (Act, Feb. 27, s. 5). The nearest equivalent of this mode of holding up to public odium is the power still existing of placarding on a shop a second conviction within twelve months of the owner for selling unsound food (54 & 55 Vict. c. 76, s. 47).

Pilots; Pilotage.

TABLE OF CONTENTS.

1. AT COMMON LAW	117	(3) Pilot Boats	126
2. BY STATUTE	120	(4) Trinity House	127
(1) Pilotage Authorities	120	3. COMPULSORY PILOTAGE	129
(2) Offences of Pilots	125	(1) In the United Kingdom	129
		(2) In Foreign Countries	136

1. AT COMMON LAW.

A pilot is a person who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port (Abbott, 5th ed., 148). In most of the ports of England societies and corporations have long been established, either by charter or local Act of Parliament, for the appointment and control of pilots in particular localities (Maude and Pollock, i. 250; and a list

of such pilotage authorities is given in the Appendix (vol. ii. pp. 110-125) of the latter book). For the safety of navigation in many such localities the employment of a pilot is compulsory on all ships or certain classes of ships (see *post*); in such a case a pilot is not the servant of the shipowner of whose vessel he has charge, and the shipowner is not liable for his negligence; but a pilot taken voluntarily by a shipowner or master is in the position of their servant, and 'makes the shipowner responsible for his negligence' (*The Maria*, 1839, 1 Rob. W. 95; *The Eden*, 1846, 2 *ibid.* 442).

A pilot when in charge of a ship has the supreme control over her navigation, and it is his duty to insist on this position (*Greenock Towing Co. v. Hardie*, 1901, 4 Sess. Cas. (5th) 215); thus he decides whether the ship shall proceed from the dock where she is and prosecute her voyage (*Burrell v. M'Brayne*, 1891, 18 Sess. Cas. Sc. (4th) 1048); when she shall get under way (*The Peerless*, 1860, Lush. 30, 32; *The Oakfield*, 1886, 11 P. D. 34); what is the proper time and speed for her to pass through a frequented anchorage (*The Lochlibo*, 1850, 3 Rob. W. 320; 7 Moo. P. C. 427; 13 E. R. 945); the time, place, and manner for her to turn when coming out of dock (*The Ocean Wave*, 1870, L. R. 3 P. C. 205); the place or time to anchor (*The Agricola*, 1843, 2 Rob. W. 10); the manner of catting the anchor preparatory to coming to an anchor (*The Gipsy King*, 1847, *ibid.* 537); the way of carrying the anchor (*The Rigsborg Minde*, 1883, 8 P. D. 132, Humber; *The Monte Rosa*, [1893] P. 23, Thames); whether, when the ship drags or drives with one anchor down, another should be put down (*The Northampton*, 1853, 1 Spink. 152); the proper orders for the helm (*The Lochlibo*, above, 325); the rate of speed (*The Calabar*, 1868, L. R. 2 P. C. 238); what sail or headgear shall be carried (*The Christiana*, 1850, 7 Moo. P. C. 160); the trim of the ship (*London and Glasgow Eng. Co. v. Anchor Line*, 1903, 5 Sess. Cas. (5th) 1089); whether the statutory rule of the road should be followed or not (*The Argo*, 1859, Swab. 462); whether a tug shall be taken if the ship is in distress (*The Julia*, 1861, Lush. 224, 226). The master must not interfere with the pilot's authority; and "the commands of the pilot must be implicitly obeyed, for to him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only" (Parke, B., *The Christiana*, above); unless the pilot is drunk, or manifestly incapable for his duty (*ibid.* 171; Dr. Lushington, *The Lochlibo*, above; *The Peerless*, above); and the master must call the pilot's attention to anything which as a pilot he ought to know (*The Tactician*, [1907] P. 244). But if there is a clear and plain prospect of danger to the ship in a particular course, it is the duty of the master not to allow it to be adopted, *e.g.* getting under way in a thick fog (*The Girolamo*, 1834, 3 Hag. Adm. 176; *The Oakfield*, 1886, 11 P. D. 34); or he and his owners will be liable for any consequences. The master and owners are also responsible for whether a tug shall be taken where required only for the purpose of accelerating speed (*The Julia*, 1861, Lush. 224, 226); for the trim of the ship which prevents her manœuvring properly (*The Argo*, above; but see *London and Glasgow Eng. Co. v. Anchor Line*, 1903, 5 Sess. Cas. (5th) 1089); and for the towing of a ship by night from one dock to another, though there is a pilot on board, for he is not responsible under such circumstances (*The Borussia*, 1856, Swab. 94). They are not, however, liable for failure to "stand by" after a collision, if a compulsory pilot is in charge (*The Queen*, 1869, L. R. 2 Ad. & Ec. 354).

The pilot is not in common employment with the master and crew, and the shipowner is therefore liable to him for any injury or damage suffered by him which is due to their negligence (*Smith v. Steele*, 1875, L. R. 10 Q. B. 125); and a pilot now comes within the Workmen's Compensation Act, 1906, 6 Edw. VII. c. 58, s. 7. He can sue for his pilotage fee either at common law or in Admiralty, provided in the latter case that the contract is not made nor the work done within the body of a county (*Ross v. Walker*, 1765, 2 Wils. 264; *The Adah*, 1830, 2 Hag. Adm. 326; and see MARITIME LIEN); and if the claim is exorbitant, or the contract on which it is founded was made under the pressure of necessity, the Admiralty Court awards only what is a reasonable sum for the services rendered (*The Nelson*, 1805, 6 Rob. C. 227, but this is now chiefly governed by statutes, see *post*). He cannot be sued in Admiralty for damage done by a collision caused by his negligence, though he can at common law, and in the Admiralty Division as a Division of the High Court (*R. v. Judge of City of London Court*, [1892] 1 Q. B. 273; *The Octavia Stella*, 1887, 6 Asp. 182); and though, perhaps, he can be joined as a defendant in an action *in rem* against the ship in his charge, the Court in the exercise of its discretion has refused to do so (*The Germanic*, [1896] P. 84). A pilotage authority is not liable for the negligence of a pilot licensed by it (*Shaw Savill Albion Co. v. Timaru Local Board*, 1890, 15 App. Cas. 429); but it is liable for the negligence of persons not licensed by it as pilots, but employed by it for stated wages to pilot ships into its harbour, it taking the pilotage dues itself and applying them to harbour purposes (*Holman v. Irvine*, 1877, 4 Sess. Cas. (4th) 406).

A pilot may be entitled to claim salvage from a ship which he has undertaken to pilot, if the services which he renders to her are outside the scope of his contract; but, "in order to entitle a pilot to salvage reward he must not only show that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward" (Brett, L.J., *Akerblom v. Price*, 1881, 7 Q. B. D. 129, 135). It is not the test of a pilotage service being salvage that the ship lies damaged or in distress, or that the pilotage involves some hazard, and bringing the ship into safety, but whether the risk attending the services to the vessel was such that the pilot could not be reasonably expected to perform them for ordinary pilotage, or even extraordinary pilotage, reward. "In an extraordinary case it may be difficult to distinguish pilotage from salvage; in general they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor. Pilotage is a hazardous occupation from its nature, but extraordinary rewards cannot be claimed in consequence of the common perils of the employment which pilots have chosen" (Lord Stowell, *The Joseph Harvey*, 1799, 1 Rob. C. 306). "A pilot engaged as such cannot claim as a salvor, for in extraordinary pilot services additional pilotage is the proper rate of reward" (*The Enterprise*, 1828, 2 Hag. Adm. 178). "Persons assuming the character and duties of pilots are only remunerated at the rates of that service and not as salvors" (*The Columbus*, *ibid.*); for "they have an exclusive privilege of service, and are expected in return to be always ready, and are under an obligation to afford their

assistance, unless under circumstances of absolute danger to their lives; they are bound to offer their services in all weathers, and if towing is necessary they are bound to perform it, having a claim of compensation for any damage to their boats and loss of labour" (*The General Palmer*, *ibid.*, 176, 178). Accordingly it has been held that where a waterman was hired to act as pilot for a vessel in the Downs, and a gale came on, and the vessel drove and her cable had to be slipped, but she was brought in safety through the Gulf Stream and into Margate Roads, he could not claim salvage, as his services were within the scope of his contract (*The Aeolus*, 1873, L. R. 4 Ad. & Ec. 29); and a pilot on board a ship salved by tugs from a position of danger, who has rendered trifling assistance by helping at the wheel and windlass, is not entitled to salvage (*The Monarch*, 1886, 12 P. D. 5). On the other hand, a pilotage service may be salvage from its outset, or become so by supervening circumstances; thus guidance of a vessel by a person not a pilot, under extraordinary circumstances, whether called pilotage or salvage, rises to the rank of a salvage service (*The Aglaia*, 1888, 13 P. D. 160, 162); so where there are no licensed pilots, a service which would have been only pilotage in the case of a licensed pilot is salvage when voluntarily performed by others (*The Rosehaugh*, 1854, 1 Spink, 267); and it has been laid down that no pilot is bound to go on board a vessel in distress to render service for mere pilotage reward (*The Frederick*, 1838, 1 Rob. W. 16). On certain emergencies occurring which require extraordinary service, a pilot is bound to stay by the ship, but becomes entitled to salvage remuneration and not a mere pilotage fee (*The Saratoga*, 1861, Lush. 318, 321); thus pilots going on board a leaky vessel, and by pumping bringing her into safety, are entitled to salvage (*The Hebe*, 1844, 2 Rob. W. 246); a person going on board a vessel in distress, and piloting her into harbour, is entitled to salvage unless he has contracted to render the services for pilotage reward only (*The Anders Knape*, 1879, 4 P. D. 213, 217); and where a vessel during a heavy storm was being driven towards dangerous sands, her captain being ignorant of the locality, and her loss appearing inevitable, and some pilots, seeing her danger, put to sea at the peril of their lives to assist her, and, being unable to board her owing to the violence of the sea, by leading and signalling guided her into safety, they were held entitled to salvage (*Akerblom v. Price*, 1881, 7 Q. B. D. 129).

2. BY STATUTE.

The rights and liabilities of pilots are now chiefly governed by statute, and are contained in the Merchant Shipping Act, 1894, which in this respect extends only to the United Kingdom and the Isle of Man, but applies to all ships therein, British or foreign (s. 572).

(1) *Pilotage Authorities*.—Pilots are governed by pilotage authorities, which are bodies and persons authorised to appoint or license pilots, or to fix and alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage (s. 573); but such authorities are controlled by the Board of Trade, as the supreme authority in all matters relating to merchant ships and seamen (s. 713). Any such body which was in existence at the time of the passing of the Act retains its powers and jurisdiction, so far as they are not inconsistent with the Act (s. 574).

The Board of Trade may by provisional order constitute a new pilotage authority in any area where there is none, and extend the limits

of an existing authority to include a new area where there is none; and in either case there shall be no compulsory pilotage, and no restriction on the power of duly qualified persons to obtain licences as pilots (s. 575). The Board of Trade may also by provisional order transfer pilotage jurisdiction over a port other than that where the pilotage authority for that port resides or has its place of business, from the pilotage authority to the harbour authority or other local body exercising local jurisdiction in maritime matters at that port, or to a new pilotage authority (as above), or to the Trinity House, or it may transfer the whole or any part of the jurisdiction of the pilotage authority to a new authority. For the purpose of such transfer the Board may incorporate the body receiving the transfer, if it is new; it may make it a pilotage authority, determine the limits of its district, sanction a scale of pilotage rates therein, determine how far and under what conditions already-licensed pilots shall act under the new authority, sanction the apportionment of pilotage funds belonging to the pilots of the transferring authority between them and the pilots of the receiving authority, and provide compensation or superannuation for officers of the transferring authority not continued in office by the receiving authority (s. 576). The Board may also provisionally order that pilots, and, if it seems expedient, shipowners, shall be directly represented on the pilotage authority of the district, or any committee, or commissioners, or sub-commissioners thereof (s. 577); and that all ships or any classes of ships shall be exempted from compulsory pilotage upon any terms and conditions that the Board may see fit to annex to such exemptions (s. 578). Where pilotage is not compulsory, nor the power of obtaining pilotage licences restricted, the Board may in the same way give to the pilotage authority powers with respect to licences, the amount of pilotage rates, and where the number of pilots is not restricted, the recovery of pilotage rates and the preventing the employment of unqualified pilots; and it may give facilities for enabling duly qualified persons, after examination, to obtain pilot licences (s. 579). These provisional orders are made on written application being made by some person interested in the pilotage or pilotage laws of the district; notice of such application having been made, and its objects, must be given in the *Shipping Gazette* and local papers; the application is referred to the pilotage authority for the district for its opinion; and if the Board of Trade, after considering any objections made, makes the order, copies thereof must be sent to the applicant and the pilotage authority; but no such order takes effect till confirmed by Parliament, and for that purpose it must be contained in a public general Bill introduced by the Board into Parliament; and if the order be petitioned against in either House, it is referred to a Select Committee, and the petitioner may appear and oppose as in the case of a private Bill (s. 580).

Pilotage authorities may, by by-law under the Act, exempt any ships or classes of ships from compulsory pilotage, or annex terms and conditions to such exemptions, and revise and extend any such or already existing exemptions as they think fit (s. 581). They may also by by-laws (1) fix the qualifications as regards age, service, skill, character, and otherwise of applicants for pilotage licences; (2) regulate the approval and licensing of pilot boats; (3) provide for the establishment and regulation of companies for supporting such boats, and sharing in their profits; (4) fix the terms and conditions of granting licences to pilots and apprentices, and pilotage certificates for masters

and mates; (5) make regulations for the government of licensed pilots and apprentices, and masters and mates holding pilotage certificates granted by that authority, and their good conduct, and appoint punishments for breach of such regulations, by withdrawing and suspending the licence or certificate, or inflicting fines up to £20; (6) fix the rates of remuneration demandable by pilots, and alter the same, but not so as to allow higher rates than certain ones specified in Sched. 21 to the Act in the case of the Trinity House, and in the case of any other pilotage authority than the rates allowed immediately before May 1, 1855 (the beginning of the 1854 Act); (7) arrange with any other pilotage authority concerning the limits of their respective districts, and the mutual limitation of each other's powers and the privileges of their pilots, or the delegation or surrender of them to a third pilotage authority, as shall be desirable for facilitating navigation or reducing charges on shipping; (8) establish, either alone or in conjunction with other authorities, funds for the relief of infirm or superannuated pilots or their families, and regulate the contributions to and participations in such funds; (9) require masters and mates holding pilotage certificates to contribute to such funds, and make periodical returns to them of the pilotage services they have rendered, but their contributions shall not exceed such proportion of the pilotage dues on their ships as would have been payable if they had had no certificate; (10) provide for special licences being granted for pilotage beyond the limits of the authority's district, but not so that such licensed pilot when outside that district can supersede an unlicensed pilot (s. 582). No such by-law can take effect until published as directed by the Board of Trade, and confirmed by Order in Council (s. 583). An appeal to the Board of Trade is allowed against any regulation or by-law of a pilotage authority in force before May 1, 1855, or made otherwise than under the authority of the Act, if brought either (*a*) by the majority of the pilots at the port, or (*b*) the Local Marine Board, or (*c*) if there is no such Board, by any number of persons not less than six, being masters, owners, or insurers of ships; and the Board may revoke, alter, or add to such regulation or by-law as to it may seem just, and its order is conclusive in the matter (s. 584).

Every pilotage authority must make returns to the Board of Trade with regard to (1) by-laws and regulations relating to pilotage, whether made under the Act or not; (2) the names and ages of all pilots and apprentices licensed to act, and all such acting directly or indirectly under it, whether licensed or not; (3) the service for which each is licensed; (4) the rates of pilotage in force, including charges on shipping in respect of pilotage; (5) the total amount received for pilotage, distinguishing between British and foreign ships, and classes of ships; and also the amount paid by outward-going ships before reaching the outer limits of pilotage water, or by inward-bound ships before reaching their port or destination, which have to take two or more pilots, whether licensed by the same or different pilotage authorities; and the numbers of ships of each of the several classes paying such several amounts; (6) the receipts and expenditure of all moneys received in respect of pilotage by the authority or its sub-commissioners; (7) the receipts and expenditure in separate accounts in respect of any pension or superannuation funds administered by the authority. Every pilotage authority must allow the Board of Trade, or any person it appoints, to inspect any of its books or documents relating to the matters of

which a return is required; any such returns must be laid without delay by the Board before Parliament; and if any pilotage authority, other than the Trinity House or pilotage sub-commissioners appointed by them under the Act, fails to make a return within a year after the time fixed therefor by the Board, or to comply with the requirements as to inspection, an Order in Council may direct that all the pilotage powers of that authority shall cease or be suspended, and the Trinity House may thereafter or during the suspension exercise all the powers which it is authorised to exercise in a district in which no provision for the appointment of pilots is made by Act of Parliament or Charter, and all the powers of the defaulting authority (s. 585).

Pilots.—A pilot is a qualified pilot for the purposes of the Act if duly licensed by any pilotage authority to conduct ships to which he does not belong; every qualified pilot on his appointment receives a licence containing his name, usual abode, and description, and the limits within which he is qualified to act; the licence must be registered with the chief officer of customs at the place nearest to the residence of the pilot, and he cannot act as pilot till this done; a qualified pilot acting beyond the limits for which his licence qualifies him is an unqualified pilot (s. 586). A qualified pilot must be furnished with copies of the statutory and other pilotage provisions for his district, and must produce them to any person employing him on demand, under penalty of £5 (s. 587). When acting as pilot he must be provided with his licence, and produce it to his employer if required, under penalty of £10, and suspension or dismissal (s. 588). He must also produce and deliver it up, if required, to the pilotage authority licensing him, however arbitrarily it be demanded (*Henry v. Newcastle Trin. Ho. Board*, 1858, 8 El. & Bl. 723); and on his death the person into whose hands the licence comes must transmit it to the pilotage authority, under penalty of £10 (s. 589). An unqualified pilot fraudulently using a licence is liable to a fine of £50 (s. 590).

Pilotage dues are not payable by King's ships (M. S. A., s. 741; *Symons v. Baker*, [1905] 2 K. B. 723, unless registered, M. S. A., 1907, s. 80); and they are not included in "port charges" in a charter-party (*Whittall v. Rahtkens S. C.*, 1907, 12 C. C. 226).

Pilotage dues on a vessel which makes use of the service of a qualified pilot are payable by (a) the owner or master; (b) in the case of pilotage inwards or outwards, the consignees or agents paying or making themselves liable to pay any other charge on account of the ship in the port of arrival or discharge, or any other charge on account of the ship in the port of clearance, respectively; they may be recovered in the same way as fines of like amount under the Act, but not till after they have been previously demanded in writing; any consignee or agent thus made liable for pilotage dues may retain the amount thereof, and that of the expenses to which he has thereby become liable, out of any moneys received by him on account of the ship and belonging to its owner (s. 591). A pilot receiving, or a master offering to pay, a rate for pilotage, whether greater or less, other than the legal rate, is liable to a fine of £10 (s. 592). A pilot who leads a ship from his boat when that ship has no pilot on board, and cannot be boarded by him owing to particular circumstances, is entitled to the full pilotage rate for the distance run, as if he had been on board and in charge of the ship (s. 593). No pilot can, without his consent, except in case of unavoidable necessity, be taken beyond the limits of his district; and if he is

so taken he is entitled, in addition to his pilotage dues, to a sum of 10s. 6d. per day, this sum being reckoned from and inclusive of the day on which he passes those limits, and up to and inclusive of the day on which he is returned to the place where he is taken on board, or, if discharged at a distance from that place, such day as will allow him sufficient time to return thereto, and in this case he is entitled to his reasonable travelling expenses (s. 594). This payment is not "pilotage dues" for which shipbrokers are liable under sec. 591 (*Morteo v. Julian*, 1879, 4 C. P. D. 216). The master must on demand declare truly to a qualified pilot, who is in charge of his ship, her draught of water; and if he refuses to do so, or makes or is privy to making a false declaration, he is liable for each offence to a fine not exceeding double the dues payable to the pilot; and if he makes or is privy to making a fraudulent alteration in the marks on the stern or stern-post of the ship denoting the draught of water, he is liable for each offence to a fine up to £500 (s. 595).

An unqualified pilot may in any district take charge of a ship without subjecting himself or his employer to any penalty, (a) where no qualified pilot has offered or signalled to take charge of a ship; (b) where a ship is in distress, or under circumstances where the master must take the best available assistance; or (c) for changing the moorings of any ship in port, or docking or undocking her, where this can be done without infringing port regulations or harbour-master's orders (s. 596). He may be superseded by a qualified pilot, but is entitled to have a proportion of the charge payable to the qualified pilot deducted therefrom and given him for his services; and in case of dispute, the pilotage authority for the district decides the proportions due to each (s. 597). An unqualified pilot, whether in a district where pilotage is compulsory or not, who takes or continues in charge of a ship after a qualified pilot has offered to do so, is liable for each offence to a fine of £50, e.g. mate acting as pilot of ship after proper pilot has offered (*Turner v. Peat*, 1888, 53 J. P. 230), and a master of a ship in the like case who employs or continues to employ an unqualified pilot after a qualified pilot has offered or signalled to take charge of her, is liable to a fine of double the pilotage demandable from the ship (s. 598). See *post*, p. 130.

A pilotage authority may, on application by a master or mate of any ship, and payment by him of the usual expenses, examine him as to his capacity to pilot any ship of his owner's within the district of that authority, and grant him, if competent, a pilotage certificate specifying the name of its holder, the ship or ships for which it is granted, the limits in which it is available, and its date of grant; the holder of such a certificate may pilot such ships within those limits without incurring any penalty for not employing a qualified pilot; and such a certificate is in force for one year, but may be renewed by indorsement under the hand of the proper officer of the pilotage authority (s. 599). A certificate relating to a ship not owned by the firm named in it nor by the persons who owned the ship for which it was originally granted is bad (*The Bristol City*, [1902] P. 10). If the pilotage authority (a) unreasonably refuse or neglect to examine a master or mate, or (b) unreasonably refuse to grant a certificate after examination, or (c) unfairly or improperly conduct such examination, or (d) impose unfair or improper terms on granting such certificate, or (e) improperly withdraw a pilotage certificate from them, such master or mate may appeal to the Board of

Trade; and the Board, if the case requires it, may appoint persons to examine the appellant, and grant him, if found competent, a pilotage certificate, on terms which they think fit, such certificate being in form, duration, and effect the same as one granted by a pilotage authority, and renewable at the discretion of the Board either by themselves or the pilotage authority (s. 600). A pilotage certificate under these sections or under sec. 604 (home trade passenger ships) cannot be granted to a master or mate of a ship unless he is a British subject (6 Edw. VII. c. 48, s. 73). The Board or pilotage authority may respectively withdraw any certificate granted by them, for misconduct or incompetency, and it thereby becomes of no effect (s. 601). Fees are payable on the granting and renewal of pilotage certificates of masters and mates, which are fixed either by the pilotage authority, with the consent of the Board of Trade, or by the Board if it grants or renews the certificates, but they must not be less than the fees payable by qualified pilots in that district; such fees, in the former case, after paying the expenses approved by the Board of such examinations and certificates, go to the Pilots' Superannuation Fund of the port or district, or for the benefit of the pilots thereof, in such way as the pilotage authority thinks best; and in the latter case, after paying expenses, for the benefit of the pilots of the district, in such way as the Board thinks best (s. 602).

(2) *Offences of Pilots.*—The following offences of pilots are specially dealt with by the Act. A pilot—(a) keeping, either directly or indirectly, a public-house or place of public entertainment, or selling, directly or indirectly, wine, spirits, tobacco, or tea; or (b) committing any fraud against the customs and excise laws and revenues; (c) being directly or indirectly concerned in corrupt practices with regard to ships, and their tackle, furniture, cargoes, crews, or passengers, or persons in distress at sea or by shipwreck, or their property; (d) lending his licence; (e) acting as pilot while suspended, or (f) while drunk; (g) employing on board any ship of which he has charge any boat, anchor, cable, or other store, etc., beyond what is necessary for the service of the ship, in order to increase the expense of pilotage, either for the profit of himself or some other person; (h) refusing or wilfully delaying, when not prevented by illness or other reasonable cause, to take charge of a ship within the limits of his licence, on her signalling for a pilot, or his being required to do so by her owner, master, agent, or consignee, or by any officer of the pilotage authority or chief officer of customs; (i) unnecessarily cutting or slipping (or so causing to be done) any ship's cable; (k) refusing, on request by the master, to take a ship in his charge into any port or place where he is qualified to take her, except on reasonable ground of danger to the ship; (l) quitting a ship in his charge without the consent of the master before performing the service for which he was hired—is liable for each offence to a fine of £100 in addition to damages, and if sharing in or privy to committing any such offence, is liable to suspension and dismissal as well as a fine; and any person sharing in or privy to committing such offence is liable, besides damages, to a fine up to £100 (s. 606). Any pilot in charge of a ship who, by wilful breach or neglect of duty or drunkenness, does anything tending to the immediate loss or destruction or serious damage of the ship, or immediate endangering of the life or limb of any person on board her, or refuses or omits to do anything requisite for him to do for the like objects, is guilty of a misdemeanor, and if qualified is also liable to

suspension or dismissal by his pilotage authority (s. 607). Any person who, by wilful misrepresentation of circumstances affecting the safety of a ship, obtains or tries to obtain charge of that ship, and any person sharing in or privy to such offence, is liable, besides damages, to a fine up to £100, and if a qualified pilot, to suspension and dismissal by his pilotage authority (s. 608). Where pilots are represented on the pilotage committee, commissioners, or sub-commissioners, these bodies have the same power to suspend or dismiss, or suspend or revoke the licences of pilots found guilty of any of these offences as the pilotage authority has (s. 609). A pilot, if aggrieved by suspension or dismissal, or by the suspension or revocation of his licence, or by being fined more than £2, or by his rights in respect of a pilotage fund being prejudiced, may appeal to a judge of County Courts having jurisdiction in the port to which he is licensed, or to a metropolitan police magistrate or stipendiary magistrate having jurisdiction there, either of whom hears the appeal with an assessor of nautical and pilotage experience, selected by himself, unless the pilot is a Trinity House pilot, in which case a Brother of the Trinity House sits as assessor, and the assessor may be objected to by either party. The judge or magistrate may confirm, reverse, or modify, by increasing or decreasing the penalty, the decision of the pilotage authority or body, and his decision is final; and the costs of the pilotage authority come out of any fund applicable for its general expenses. Rules of procedure may be made, as regards County Court judges, by the authority in that behalf under the County Courts Act, 1888, and as regards magistrates, by a Secretary of State, but in either case with the concurrence of the Treasury as to fees (s. 610) and as to time for appealing to a magistrate from the decision of a pilotage authority, see *R. v. Lewis*, [1906] 2 Q. B. 307.

(3) *Pilot Boats*.—Pilot boats are boats and ships regularly employed in the pilotage service of a district, and approved and licensed by the pilotage authority; and that authority may, at its discretion, appoint and remove the masters of such boats (s. 611). Every pilot boat must have painted on her stern the name of her owner and port, and on each bow the number of her licence, and be painted elsewhere black outside, or such colour as the pilotage authority, with the Board's consent, direct; and when afloat she must carry a pilot flag of large size, the upper half being white and the lower half red, at the masthead or some equally conspicuous place. It is the duty of her master to see that the boat complies with these provisions, and that the flag is kept clean and distinct, so as to be easily discernible, and that the names and numbers are not concealed, under penalty for each offence up to £20 (s. 612). A qualified pilot, when carried off in a vessel not in the pilotage service, must exhibit a pilot flag to show that the ship has a qualified pilot on board, and for not doing so, except for a reasonable cause, he is punishable by fine up to £50; and where the master or mate of a ship holds a pilotage certificate, a pilot flag must be shown on board while such officer is on board and the ship is within a district where pilotage is compulsory, or the master is liable to a fine of £20 (s. 613). If a ship or boat not having a licensed pilot, master, or mate on board, displays a flag so like a pilot flag as to be likely to deceive, the owner or master, unless he can prove that he did not mean to deceive, is liable to a fine for each offence up to £50 (s. 614). Rules may be made by Order in Council with regard to signals to be used by a vessel requiring a pilot, known as pilot signals; a vessel requiring a pilot must use the pilot

signals, and if the master of a ship uses or allows to be used any of the pilot signals except for summoning a pilot, he is liable to a fine for each offence up to £20 (s. 615).

(4) *Trinity House*.—The chief pilotage authority is the Trinity House (*q.v.*), the area of its jurisdiction comprising—(1) the London district, which consists of the waters of the Thames and Medway as high as London and Rochester Bridges respectively, and also the sea and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south; (2) the English Channel district, consisting of the seas between Dungeness and the Isle of Wight; (3) the outport districts comprising any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter; and a local Act applying to a particular port the provisions of the General Pilot Act of 1825, except that the sub-commissioners were to be resident within the port of Ipswich, is not such a “particular provision” (*Hadgraft v. Hewith*, 1875, L. R. 10 Q. B. 350). The Trinity House appoints sub-commissioners (not more than five or less than three) for the examination of pilots in all districts in which it has been used to do so before the Act, and may also, with the consent of His Majesty in Council, appoint sub-commissioners of any other district in which no particular provision is made by Act of Parliament or charter for the appointment of pilots. Pilotage districts under the authority of sub-commissioners appointed by the Trinity House cannot be extended except with such consent as above, and sub-commissioners appointed by the Trinity House are not pilotage authorities within the meaning of the Act (s. 617).

The Trinity House, after due examination by itself or its commissioners, appoints and licenses, under its common seal, pilots for the purpose of conducting ships within the districts mentioned above; but may not license a pilot to conduct ships both above and below Gravesend (s. 618).

The following are the chief statutory provisions with regard to the licensing of pilots by the Trinity House, the rates of pilotage (Trinity House), and the Trinity House Pilot Fund; but some of these are subject to alteration by the Trinity House (s. 616).

Subject to alteration by the Trinity House, the names of all Trinity House pilots must be published by the fixing of a notice at their house specifying the name and usual abode of every such pilot and the limits in which he may act as such, and by transmitting copies thereof to the Commissioners of Customs in London and chief officers of customs at all ports within the limits of that pilot's licence, which must be posted up at the Custom House in London, and the custom house elsewhere. A Trinity House pilot on his appointment must execute a bond for £100, conditioned for due observance by him of the Trinity House regulations and by-laws, free from stamp duty and any charge except the expense of preparing it. A Trinity House licence continues in force up till 31st January next following its date; but may be renewed by indorsement under the hand of the secretary or other proper person on or before 31st January in every year, or any subsequent day (s. 619), but it is in the absolute discretion of the Trinity House whether the certificate shall be renewed or not (*R. v. Trinity House*, 1887, 35 W. R. 835). A Trinity House qualified pilot executing such a bond is not liable for neglect or want of skill beyond the penalty of the bond, and the amount payable to him for pilotage on the voyage in which he was engaged when he

became so liable (s. 620). The licence may be revoked or suspended by the Trinity House when and as they think fit (s. 621).

Subject to alteration by the Trinity House, the rates of pilotage in Trinity House districts existing previously to the Act are continued, but the Trinity House may by by-law repeal or relax, as to the whole or part of their district, the statutory provisions restricting the amount of pilotage rates to the legal rate, so far as to allow a lower rate to be taken (s. 626). Subject to any alteration by the Trinity House, foreign ships trading to and from the port of London, and not exempted from pilotage, must pay in the case of ships inwards, the full amount of pilotage dues for the distance piloted; in the case of ships outwards, the full amount of dues for the distance required by law; payment must be made to the chief officer of customs in the port of London by the master or person in charge of the ship, or consignees or agents paying or making themselves liable to pay any other charge for the ship in the port of London; and such dues are recoverable as other pilotage dues are (see above, ss. 591, 627). Subject to alteration by the Trinity House, the chief officer of customs on receiving any pilotage dues from a foreign ship gives a written receipt therefor, and the ship may be detained in the port of London till the receipt is produced to the proper custom officer there; these dues are then paid over to the Trinity House, which applies them, firstly, in paying the dues which would have been payable to the pilot in charge of her if she had been a British ship, after deducting the poundage due to the Trinity House; secondly, in paying to any unlicensed person who has had charge of the ship in the absence of a licensed pilot such amount as the Trinity House may think proper, but not more than what a licensed pilot would have received, after deducting poundages; and, lastly, in paying over to the Trinity House Fund the residue and deducted poundages (s. 628). In case of a difference between the master and qualified pilot of any ship trading to or from London as to her draught of water, the Trinity House, on application by either party, within twelve hours after the ship's arrival, or at some time before beginning to discharge cargo, and in case of a ship outward bound, before she leaves her moorings, may appoint an officer to measure the ship and settle the difference; and he receives from the person against whom he decides one guinea if the ship be below, and half one guinea if the ship be above, the entrance of the London Docks at Wapping (s. 629).

The Trinity House Pilot Fund, subject to alteration by the Trinity House, receives a poundage of 6d. in the £1 on the pilotage earnings of all Trinity House pilots, and also a sum of three guineas payable on 1st January in every year by persons licensed by the Trinity House to act as pilots in districts not superintended by sub-commissioners, or any part of them. A qualified pilot giving a false account of his earnings, or failing to pay any sum due from him hereunder, is liable for each offence to a fine of double the amount payable, and also, at the discretion of the Board, to suspension or dismissal (s. 630). This fund is chargeable, firstly, with payment of the Trinity House's expenses in performing their pilotage duties, and (subject to alteration by them) is then administered by them for the benefit of pilots licensed by them after October 1, 1853, and incapacitated for their duty by age, infirmity or accident, and the widows and children of pilots so licensed, or such incapacitated pilots only (s. 631).

The Trinity Houses of Hull and Newcastle may also appoint sub-commissioners (not more than seven or less than three) for examining pilots in districts where they have been used to appoint such, and with the consent of His Majesty in Council may appoint like sub-commissioners for any other district situate within their jurisdiction. A pilotage district under the authority of any sub-commissioners of the above corporations cannot be extended except with the like consent. Sub-commissioners so appointed are not pilotage authorities within the meaning of this Act; and nothing in the Act is to give the pilotage commissioners for Hull or the Humber any new jurisdiction (s. 632).

3. COMPULSORY PILOTAGE.

Compulsory pilotage exists in many countries besides the United Kingdom. It is proposed here to deal with compulsory pilotage (1) as existing in the United Kingdom; (2) as existing elsewhere.

(1) *In the United Kingdom.*—Pilotage is compulsory for certain classes of ships in certain areas of the territorial waters of the United Kingdom, either by the general law contained in the Merchant Shipping Act, 1894, or by local laws and charters of certain ports which, with their exceptions, are saved by the general Act.

This "compulsion" has been defined as a liability to pay pilotage dues as a penalty for refusing to take a pilot on board, though the same dues must be paid if the pilot is taken (Dr. Lushington, *The Maria*, 1839, 1 Rob. W. 105); and this is the test to be applied to the language of either general or local Acts of Parliament or of charters. Where a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination (Sir R. Phillimore, *The Hibernian*, 1872, 1 Asp. 491, 497 (P. C.), where pilotage was compulsory under a Canadian statute).

As already seen, the Board or Trade has power to exempt by provisional order the masters and owners of all ships or classes of ships from being obliged to employ pilots in any pilotage district or from being obliged to pay for pilots when not employing them in any district or part of a district, and annex any terms and conditions to those exemptions (M. S. A., s. 578); and pilotage authorities also may by by-law (subject to confirmation by Order in Council) exempt the masters of any ships or classes of ships from being compelled to employ qualified pilots, and annex any terms and conditions to those exemptions, and revise or extend any such exemptions or any exemptions existing by virtue of any Act of Parliament, law, charter, or usage, upon such terms and conditions and in such manner as may appear desirable to the authority (ss. 581 and 583).

The existing general law as to compulsory pilotage is contained in the following provisions of the Merchant Shipping Act, and for convenience in reference, most of the decisions having been upon the older general Act of 1854, it may be mentioned here that sec. 603 of the 1894 Act corresponds to sec. 353 of that of 1854; sec. 604 to sec. 354; sec. 625 to sec. 379; sec. 622 to sec. 376; sec. 633 to sec. 388.

Subject to any alteration to be made by the Board of Trade or by any pilotage authority, in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement

of this Act, but all exemptions from that compulsory pilotage shall continue to be in force. If within a district where pilotage is compulsory, the master of an unexempted ship, after a qualified pilot has offered to take charge of the ship or has made a signal for the purpose, pilots his ship himself without holding the necessary certificate, he shall be liable for each offence to a fine of double the amount of the pilotage dues that will be demanded for the conduct of the ship (s. 603). The exemptions saved by this section and continuing in force are those contained in the Pilot Act of 1825, 6 Geo. iv. c. 125, similarly saved by the Merchant Shipping Act of 1854, s. 353 (*The Earl of Auckland*, 1861, Lush. 164, 387, followed in *The Cayo Bonito*, [1903] P. 203). They are as follows:—

The master of any collier or of any ship or vessel trading to Norway or to the Cattegat or Baltic, or round the North Cape or into the White Sea, on their inward or outward voyages, or of any constant trader inwards from the ports between Boulogne inclusive and the Baltic, all such ships and vessels having British registers and coming up either by the North Channel, but not otherwise, or of any Irish trader using the navigation of the rivers Thames or Medway, or of any ship employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof; or of any ship or vessel not exceeding sixty tons, and having a British register (and equally foreign ships of that size by Order in Council, s. 60), and any other ship whilst the same is within the limit of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by an Act or Acts of Parliament or by any charter or charters for the appointment of pilots, shall and may lawfully conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot, or other person or persons than the ordinary crew of the said ship or vessel (s. 59).

This exemption in the case of vessels on voyages between any port in Sweden and Norway and the port of London has now ceased (1897, 60 & 61 Vict. c. 61, s. 1), but this does not affect sec. 625 of the Merchant Shipping Act, 1894, and the exception under the latter for ships not carrying passengers continues (*The Columbus*, 1899, 8 Asp. 488); and some of the other cases are also provided for by the present Merchant Shipping Act (see s. 625).

The "clumsy and careless language of this section, namely, in not providing for vessels trading *outwards* to the ports between Boulogne and the Baltic, or for vessels coming inward by the south channels" (Sir R. Phillimore, *The Vesta*, 1882, 7 P. D. 244), was amended by Order in Council of February 18, 1854 (made under the Pilotage Act, 1853), which allowed exemption to "the masters of ships and vessels trading to Norway or to the Cattegat or Baltic or round the North Cape or into the White Sea, when coming up by the south channels; of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic, on their outward passages, and when coming up by the south channels; of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port and not being bound to any port or place within such limits or anchoring therein." The Order in Council is subsidiary to this section, and so far as "ships and vessels trading to ports between Boulogne (inclusive) and the

Baltic" are concerned refers only to constant traders (*The Cayo Bonito*, [1902] P. 216, at p. 228; 1903, P. 203). It has been held that the provisions of this section, confirmed by sec. 603 (1) of the present Act, are not limited by the negative terms of sec. 625, below (s. 379 of the old Act) (*R. v. Stanton*, 1857, 8 El. & Bl. 445, where a Baltic passenger ship was held not bound to employ a pilot), but are overridden by the positive terms of sec. 604 (s. 354 of the old Act) (*The Temora*, 1860, Lush. 17, where an Irish trader carrying passengers was held bound to have a pilot in the Thames); and this section makes pilotage compulsory in the Tyne for ships carrying passengers between the British Islands (*The Warsaw*, [1898] P. 127), though the local Act (Tyne Pilotage Confirmation Act, 1865) makes pilotage not compulsory for foreign vessels (*The Johann Sverdrup*, 1886, 12 P. D. 43).

What is "a port or place in relation to which particular provision has been made by Act of Parliament, or by charter, for the appointment of pilots," is illustrated by the cases of *The Killarney*, 1861, Lush. 202, port of Goole, governed by special Act; *Tyne Commissioners v. General Steam Navigation Co.*, 1866, L. R. 2 Q. B. 65, port of Newcastle-on-Tyne, governed by special Act; *The Hankow*, 1879, 4 P. D. 197, port of London, governed by the charter of the Trinity House; *The Ruby*, 1890, 15 P. D. 139 and 164, port of Llanelly, governed by local Act. Pilotage is compulsory on foreign vessels coming in or out of the port of Blyth (*The Holar*, [1901] P. 7).

By sec. 62 of the same Act a master or mate who is owner or part owner of a ship, and lives at Dover, Deal, or the Isle of Thanet, is allowed to pilot his ship from any of the places aforesaid, up or down the Thames or Medway, or into or out of any port or place in the jurisdiction of the Cinque Ports. Under this section it has been decided that a master piloting his own ship on a foreign voyage, beginning in the port of London, was bound to take a pilot, though he was a part owner and lived in the Isle of Thanet (*Williams v. Newton*, 1845, 14 Mee. & W. 747; 69 R. R. 810), and that "from the places aforesaid," means from Dover, Deal, or the Isle of Thanet, and not the places mentioned in the previous sections (*Peake v. Screech*, 1845, 7 Q. B. 603). The Order in Council of 1854, "like the statute to which, so far as it relates to exceptions, it is subsidiary and explanatory, only applies to British vessels and not to foreign ones;" and thus a foreign vessel carrying cargo and passengers from London to ports between Boulogne and the Baltic is not exempt from having to take a pilot (*The Vesta*, *ante*, and *The Hanna*, 1866, L. R. 1 Ad. & Ec. 291).

The present Merchant Shipping Act further provides that the master of every ship carrying passengers between any place in the British Islands and any other place so situate (home-trade passenger ships) shall in pilotage waters employ a qualified pilot, unless he or the mate of his ship holds a pilotage certificate, under penalty of a fine (s. 604); under this section it has been held that Ireland is a "place so situate" (*The Temora*, *ante*). This section has been held to repeal by implication a provision of a local Act giving an exemption from compulsory pilotage, and a ship carrying passengers between places in the British Islands must have a pilot within the district of the Leith Trinity House (*Randall v. Renton*, 1902, 5 Sess. Cas. (5th) (Just. Cas.) 16). The master or owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district shall be exempted from any obligation to employ a pilot in that district or to

pay pilotage rates when not employing a pilot within that district; the exemption under this section shall not apply to ships loading or discharging at any place situate within the district, or at any place situate above the district on the same river or its tributaries (s. 605). Under this section it has been held that the word "loading" does not refer to the taking on board of cargo only, and thus a steamer anchoring in Dartmouth Harbour and taking on board 20 tons of coal, being bound for Newcastle (a place outside the pilotage district) from New York (also outside it), was bound to have a pilot on board (*The Winston*, 1884, 9 P. D. 85, affirming *Sir J. Hannen*, 8 P. D. 176); but it does not include taking up a pilot (*Gregory v. Jones*, 1890, 90 L. T. Jo. 42). Pilotage is compulsory within the London district (see *ante*) and the Trinity House outport districts, e.g. Falmouth (*The Juno*, 1876, 3 Asp. 217). Pilotage is compulsory in the Isle of Wight district and Southampton district, which are subdivisions of a district under sec. 605 (*The Assaye*, 1905, P. 289); and the master of any ship (not exempt) navigating in those limits without a qualified pilot or a pilotage certificate is punishable by a fine proportioned to the tonnage of his ship (s. 622). A constant supply of pilots must be provided by the Trinity House at Dungeness; and ships coming from the westward and bound to the Thames or Medway must take the first pilot that offers, under penalty of a fine equal to twice the pilotage (ss. 623 and 624).

By sec. 625 it is provided that the following ships when not carrying passengers (for what are passengers, see PASSENGERS (SEA)), shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district and in the Trinity House outport districts—(that is to say) (1) Ships employed in the coasting trade of the United Kingdom (see COASTER);

(2) Ships of not more than sixty tons burden;

(3) Ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man. (An Order in Council of December 21, 1871, substituted Brest for Boulogne in the 1854 Act; and under the corresponding section (379) of the old Act it was decided that the words "to" Boulogne (now Brest) covered a voyage "from" Boulogne (now Brest) (*The Wesley*, 1861, Lush. 268); but the following subsection now provides this expressly.) There have been several decisions on the meaning of the word "trading" in this section (s. 379 of the old Act); e.g. a British ship, which was one of a line of vessels making regular voyages from London to Japan and ports in the East and back to London and thence to ports in Europe north of Boulogne (now Brest) and back to London, and on her return from the East discharged her crew and part of her cargo and then proceeded to Holland with the bulk of her cargo and a crew of runners but without passengers, was held to be a "trader" within this section and exempt from compulsory pilotage (*Courtney v. Cole*, 1887, 19 Q. B. D. 447). A British ship without passengers on a voyage from Gaza to Beyrout, with cargo partly for Ipswich and partly for Leith, which after discharging part of her cargo at Ipswich was proceeding on her voyage to Leith was held not to be within this section (625 (1)), nor trading from a port in Great Britain to a port north and east of Brest within its subs. (3), and to be therefore liable to compulsory pilotage (*The Glanystwyth*, [1899] P. 118) A vessel under foreign-going articles.

which went from Swansea to various places in and out of the United Kingdom, and was proceeding from Hull to Bristol, where pilotage is compulsory for all vessels except coasting vessels and Irish traders, was held not to be a coaster and was therefore liable to compulsory pilotage (*The Ravensworth*, 1905, 10 Asp. 131; M. S. A. s. 603 (3)). A vessel on a voyage from Liverpool to Hamburg, and obliged by an accident to put into the Thames for repairs, was held to be exempt under this section (*The Sutherland*, 1887, 12 P. D. 154). A vessel engaged in trading between London, the Bristol Channel, and Venice, landing part of her cargo in London and proceeding thence with it and ballast to Cardiff, and there filling up her cargo and discharging her ballast, was held not to be trading to a port north of Brest, for though Cardiff is a place in Europe north and east of Brest, "Europe" is used in contradistinction to the United Kingdom (*The Winestead*, [1895] P. 170, Bruce, J.). And a British ship laden with a general cargo from Rosario and La Plata for Rotterdam with leave to carry cattle to London, which discharged the cattle in London and proceeded with the cargo to Rotterdam, is a ship trading from a port in Great Britain to a port north and east of Brest, and therefore exempt (*The Rutland*, [1897] A. C. 333). It was pointed out in *Courtney v. Cole*, ante (A. L. Smith, J., at p. 457), that the word "constant" in connection with "trading" which appears in the Act of 1825, is omitted in the later Acts; but the terms "trader" and "constant trader" seem to mean the same thing (Barnes, J., *The Cayo Bonito*, [1902] P., at p. 231, where a British ship belonging to a line running from London to Antwerp and thence to Mexico, but only on her second voyage, was held to be a constant trader and therefore exempt from compulsory pilotage in the estuary of the Thames). The meaning of the word "trading" in connection with vessels was also considered in *Mersey Docks and Harbour Board v. Henderson*, 1887, 19 Q. B. D. 123, and 13 App. Cas. 595, where vessels which took in part of their cargo at Glasgow, sailed to Liverpool, and completed their loading there for a port in India without discharging any cargo, were held not to be "trading inwards" under the Mersey Dock Act, 1858; Lord Esher saying, "No business man, in my opinion, would think of saying that a ship which came into Liverpool with a declared intention of not delivering any goods there, and which delivered no goods there, was a ship trading inwards" (at p. 129).

(4) Ships trading from the port of Brest or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any port in Great Britain within the said London or Trinity House output district.

(5) Ships navigating within the limits of the port to which they belong. This is subject to that port not being one "in relation to which any particular provision for the appointment of pilots has been made by Act of Parliament or charter" under sec. 59 of the Act of 1825 ante (*The Killarney*, ante; *The Hankow*, ante).

The effect in law of compulsory pilotage is, that "no owner or master of any ship is answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law" (M. S. A., 1894, s. 633, replacing sec. 388 of the Act of 1854); the reason being that the pilot is not the servant of the owner, but an officer imposed by the State and put into control

or charge of the ship. All ships, whether foreign or British, are entitled to the benefit of this provision, even apart from its expression in the statute, by the common law of England (*The Maria*, ante, and the *Johanna Stoll*, 1861, Lush. 295, Dr. Lushington; Sir C. Robinson having previously decided to the same effect in *The Christiana*, 1828, 2 Hag. Adm. 183, but Sir J. Nicholl to a contrary effect in *The Girolamo*, 1834, 3 Hag. Adm. 188; so *The Halley*, 1868, L. R. 2 P. C. 193).

In order to make good the shipowner's exemption from liability to compulsory pilotage, three conditions must be satisfied—(a) The pilot must be properly qualified. Thus, if a waterman employed in the foreign vessel at the request of the pilot and steering her by the pilot's order, brings about a collision, the owners are liable (*The General de Caen*, 1855, Swa. Ad. 9); but the fact of the same pilot being employed for fifteen years by a shipowner to pilot his ships is not enough to make his employment voluntary and not compulsory (*The Batavier*, 1845, 2 Rob. W. 407; so *The Hibernian*, ante). A pilot is deemed to be a qualified pilot if duly licensed by any pilotage authority to conduct ships to which he does not belong; and every qualified pilot acting beyond the limits for which he is qualified by his licence is an unqualified pilot (s. 586 (1) and (4)). The qualifications are fixed by the pilotage authorities as confirmed by Order in Council (ss. 582, 583); and there may be several kinds of qualified pilots for the same ships in the same districts, "the qualified pilot who is always capable of acting and the qualified pilot who is liable to be superseded if a better can be obtained" (Bowen, L.J., *The Carl XV.*, [1892] P. 332, a case where a pilot of the latter kind was held to satisfy the provisions of sec. 633 (s. 388 of the old Act)); but a pilot of the latter kind is not entitled to displace a disqualified person who is piloting a ship, and the master of the ship is not liable to a penalty for continuing to employ the latter (*Stafford v. Dyer*, [1895] 1 Q. B. 566).

(b) The pilot must be in charge of the ship. Whether the pilot is in actual charge of the ship depends on the circumstances of each case, and upon the terms of the regulations of the pilotage authority which apply to the case. In particular, several decisions have been given on the terms of the Mersey Act of 1858 as to the meaning of the "ship proceeding to sea," during which pilotage is compulsory upon her. It has been held that where a vessel left her dock, anchored in the Mersey, and came into collision next day, she being under contract to sail with mails on the following day, but the master was not on board, and her rigging was being set up, she was not "proceeding to sea," and pilotage was not compulsory (*Rodrigues v. Melhuish*, 1854, 24 L. J. Ex. 26); while a ship that left dock and anchored in the Mersey, waiting there in order to be able to cross the bar next morning, was held to be "proceeding to sea" (*The City of Cambridge*, 1874, L. R. 5 P. C. 451). In another case a ship which had anchored in the river meaning to go to sea next day, but owing to an accident was waiting there in order to have repairs done to her rigging, was held not to be liable to compulsory pilotage (*The Cachapool*, 1881, 7 P. D. 217). A ship changing her berth in a harbour with a pilot on board may be subject to compulsory pilotage (*The Suffolk*, 1905, 21 T. L. R. 267 (Port Natal)).

Similarly, a question arises as to ships coming into a port and anchoring there, whether they are still "*in itinere* and on their way to their dock," and therefore require a pilot, e.g. a vessel *in itinere* in Harwich harbour may be liable to compulsory pilotage (*The Ole Bull*,

[1905] P. 52). Under the Mersey Act a vessel has been held to be still in compulsory charge of a pilot where the collision happened two days after her arrival in the river, having come too late to be docked on the day of her arrival, and the weather preventing it next day (*The Princeton*, 1878, 3 P. D. 90); a similar decision was given in *The Johanna Stoll, ante*; and it seems that under the Mersey Act in the case of outward-bound ships compulsory pilotage does not begin till the ship (if going to a stage from dock) proceeds from the stage to sea, and in the case of inward-bound ships compulsory pilotage ceases when the ship (if going to a stage before docking) deviates from her course to her dock (*The Servia and The Carinthia*, [1898] P. 36), and as to the limit of the port of Liverpool for this purpose, see *The Mercedes de Larrinaga*, [1904] P. 215; *The Sussex*, [1904] P. 236.

(c) The ship must be in a district to which the pilot belongs. Under the Hull Pilot Act, 1832, a schooner bound for a dock while in charge of a pilot who had taken her over, while moored at a pier in the Humber, from another pilot who had brought her in from sea, was held to be in his compulsory charge, only one sum being paid for the services of the two pilots (*The Rigsborg Minde*, 1883, 8 P. D. 132). If the pilot whose duty was compulsory has completed that duty, and is thus *functus officio*, e.g. by mooring a ship in the Mersey which remains there for a considerable time without going into dock, his presence on board will not exempt the shipowners (*The Woburn Abbey*, 1869, 3 M. L. C. 240).

"The pilot, however, need not be compulsorily employed at the place where the accident happens, so long as he is compulsorily employed within the district where it happens;" thus, where a vessel coming up the Channel to London took a pilot on board at Dungeness, and before reaching Gravesend collided with another vessel owing to the pilot's negligence, it was held that, assuming the port of London (to which the ship belonged) to extend to the place of collision, still as the pilot could not have been taken by the ship for a shorter distance than to Gravesend, and could insist on being carried there and being paid for piloting the ship there, and as (besides the wording of the statute (s. 633) given above) no relation of master and servant existed between the master and the pilot during the whole transit to Gravesend, the shipowners were therefore not liable (*Gen. Steam N. C. v. British and Colonial Steam N. C.*, 1869, L. R. 4 Ex. 238, Ex. Ch.). This decision has been approved and followed by the Court of Appeal in a case with similar circumstances in the Bristol Channel (*The Charlton*, 1895, 8 Asp. 29); and as to compulsory pilotage in the port of Bristol, see *Reed v. Goldsworthy*, 1903, 9 Asp. M. C. 529.

The presence of the pilot on board and being in charge is not, however, enough to save the shipowner's liability where the collision is shown to be due to his fault and that of the crew jointly, or of the latter solely (*The Diana*, 1840, 1 Rob. (W.) 131; *The Christiana*, 1850, 7 Moo. P. C. 171; 13 E. R. 845). If a collision has been caused solely by the fault of a compulsory pilot, subsequent misconduct of the master in not standing by or rendering assistance will not make her owners liable (*The Queen*, 1869, L. R. 2 Ad. & Ec. 354). The burden of proof that the cause of the collision was the fault of a compulsory pilot is *prima facie* on the owners of the ship in his charge (*London and Glasgow Engineering Co. v. Anchor Line*, 1904, 5 Sess. Cas. (5th) 1089); and the Court cannot find that the collision is caused by the fault of the pilot unless the persons relying on the plea of compulsory pilotage prove it

(*The Velasquez*, 1867, L. R. 1 P. C. 494, followed in *The Benmohr*, 1904, 52 W. R. 686); but if that *prima facie* case is rebutted, then it is for the plaintiffs to show that the defendants were guilty of some other act of negligence (*Clyde N. C. v. Barclay*, 1876, 1 App. Cas. 790; *The Indus*, 1886, 12 P. D. 49, Lord Esher). Where a moving vessel collides with a stationary one the presumption that the former is to blame is not displaced by proof that a compulsory pilot was in charge of her, unless it is clear that the collision was due to his negligence (*Mann v. Ellerman Line*, 1904, 7 F. Scotch Sess. Cas. (5th) 213). Where both vessels are to blame for the collision, the fact that one was in charge of a compulsory pilot will not prevent the general rule applying that no costs are given on either side (*The Rigsborg Minde, ante*); but where both vessels are to blame, and one was under compulsory pilotage, the owner of the latter may recover a clear moiety of her damage without making any deduction for the other's damage (*The Hector*, 1883, 8 P. D. 218).

(2) *In Foreign Countries*.—Where cases of compulsory pilotage arise in countries outside the territorial waters of the United Kingdom, the defence of the owners, whose ship having been negligently navigated by a compulsory pilot has done damage, must be supported upon the principle of law stated in *The Maria*, above (as the M. S. A. has then no application); and they will only be exempt from liability for damage done by the wrongful navigation of their ships when they are under the charge and control of a pilot compulsorily put on board and in charge and control by the local law. The mere fact of the pilot's presence on board being compulsory is not enough to exempt them; he must, like an English pilot, conduct the navigation, and if he is only "a kind of living chart" (Brett, L.J., in *The Guy Mannering*, below), the owners still remain responsible for the navigation of the ship. Thus pilots compulsorily employed under the French law in a French river (*The Augusta*, 1886, 6 Asp. 58 and 161), or in the Suez Canal under the Canal Regulations (*The Guy Mannering*, 1882, 7 P. D. 132), or in the Danube under the International Rules of Navigation of the Danube (*The Agnes Otto*, 1887, 12 P. D. 56), or in the Scheldt under Dutch law (*The Prins Hendrik*, [1899] P. 177), are not in control of the ship so as to release the shipowners from responsibility. On the other hand, if the pilot is in control, the shipowners are exempt even though the foreign law governing the place where the damage is done expressly provides that in spite of the owner surrendering the charge of his ship to the pilot, he shall still remain liable to other persons for her negligent navigation (*The Halley, ante*, Belgian law; *The Hibernian, ante*, Canadian statute).

[*Authorities*.—See Abbott, *Shipping*, 14th ed., 1901; Marsden, *Collisions*, 5th ed., 1904; Temperley, *Merchant Shipping Act*, 2nd ed., 1907; Williams and Bruce, *Admiralty Practice*, 3rd ed., 1902; Maude and Pollock, *Shipping*, 4th ed., 1881.]

Pin Money.—See HUSBAND AND WIFE.

Pinnage.—Poundage of cattle.

Piracy (Literary).—See COPYRIGHT.

Piracy; Pirate.—I. **PIRACY.**—AT COMMON LAW AND BY THE LAW OF NATIONS.—"The offence of piracy by common law," says Black-

stone, "consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there" (Blackstone, *Com.*, vol. iv. p. 72, 1770 ed.).

Piracy has been defined as "only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, with a felonious intention, in place where the Lord Admiral hath jurisdiction, this is robbery and piracy" (*R. v. Dawson*, 13 St. Tri. 654, confirmed in *A.-G. for Hong-Kong v. Kwok-a-Sing*, 1873, L. R. 5 P. C. 179).

Piracy is an offence against public international law or the law of nations (see INTERNATIONAL LAW).

"That which is called robbery upon the highway, the same being done upon the water is called Piracy," said Sir Leoline Jenkins in 1688. "Now robbery, as 'tis distinguished from thieving or larceny, implies, not only the actual taking away of my goods while I am, as we say, in peace, but also the putting me in fear by taking them away by force and arms out of my hands or in my sight and presence; when this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy." "All pirates and sea-rovers," said the same authority, "are in the eye of the law *hostes humani generis*, enemies not of one nation or of one sort of people only, but of all mankind. They are outlawed, as I may say, by the laws of all nations, that is, out of the protection of all princes and of all laws whatsoever. Everybody is commissioned and is to be armed against them as against rebels and traitors to subdue and root them out" (*Life of Sir Leoline Jenkins*, vol. i. p. lxxxvi.).

Piracy by the law of nations was defined by Sir James Fitzjames Stephen as "Taking a ship on the high seas or within the jurisdiction of the Lord High Admiral from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself or any of its goods, tackle, apparel, or furniture under circumstances which would have amounted to robbery if the act had been done within the body of an English county" (Digest of Criminal Law Act, 108). This definition was founded on the definition given by Sir Charles Hedges in *R. v. Dawson*, 1696, 13 St. Tr. 454, which was recognised by the Judicial Committee of the Privy Council in *A.-G. for Hong-Kong v. Kwok-a-Sing*, 1873, L. R. 5 P. C. 179, at p. 199.

"The crime of piracy," said Blackstone, "is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right by the rule of self-defence to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property" (Blackstone, *Com.*, vol. iv. p. 72, 1770 ed.).

As to proposals to assimilate the slave trade to piracy, see SLAVE TRADE; see also VISIT AND SEARCH.

Inasmuch as acts of piracy constitute men pirates, rebels and insurgents may, though organised, be regarded as pirates. For a discussion of the question whether unrecognised insurgents should be considered as pirates, see Westlake, *International Law*, part i., 1904, pp. 179-182;

Wheaton, *International Law*, 4th Eng. ed., 1904, ss. 124*a*, 124*b*; see also *U. S. v. Smith*, 1820, 5 Wheaton, 153; *The Ambrose Light*, 1885, Scott. Cases, 346; *The Magellan Pirates*, 1 Spinks, 81; *The Huascar*, 3 Wharton's *Digest*, 474; *Le Louis*, 1817, 2 Dodson, 210).

The King's Regulations and Admiralty Instructions contain a special provision as regards armed vessels not having a commission of war or a letter of marque from a foreign *de facto* Government, which commit piratical acts and outrages against the vessels and goods of His Majesty's subjects, or of the subjects of any foreign Power in amity with His Majesty.

And they further provide that in the case of an attack by a ship in the possession of insurgents against their own domestic Government, upon ships of war of that Government, upon merchant ships belonging to its subjects, or upon its cities, ports, or people within the territorial limits of their own nation, His Majesty's ships have no right to interfere, except in the case mentioned in Article 447 (when the lives or property of British subjects are actually in danger); and in any such case the operation must be restricted to such acts as may be necessary to attain the precise object in view (Art. 450).

A Spanish official decree, dated April 24, 1898, issued in connection with the war with the United States, contained a declaration in the following terms:—"Captains, masters, and officers of vessels which, as well as two-thirds of their crew, are not American, captured while committing acts of war against Spain, even if they are provided with letters of marque issued by the United States," shall be regarded and judged as pirates with all the rigour of the law (Clause VII.). The provision appears to have been borrowed from a notification during the Franco-Mexican war of 1839, by Admiral Baudin, who declared that every privateer sailing under the Mexican flag, of which the captain and two-thirds of the crew were not Mexicans, would be treated as pirates. The right to treat neutral vessels accepting letters of marque as piratical is questionable. In 1854 Lord Clarendon made a proposal to the United States minister to conclude a treaty in this sense (Wharton, *Digest*, s. 385), but the ordinary clause in treaties simply provides that no citizen of either State shall take a commission from a foreign Power to arm privateers against the other. This provision figured in the treaty of 1795 between the United States and Spain. Since the Declaration of Paris (*q.v.*) and its practical adoption even by States which have not subscribed it, the subject has only retained the importance that States not parties to the Declaration choose to give it.

See further as to the offence of piracy *jure gentium* Moore, *Digest of International Law*, vol. ii. ss. 311-314, pp. 951-979.

For precedents of indictments for piracy *jure gentium*, see *R. v. Kidd*, 14 St. Tr. 147; see also *R. v. Bonnet*, 15 St. Tr. 1231; Archb. *Cr. Pl.*, 23rd ed., p. 539.

II. PIRACY BY STATUTE.—It is essential that the distinction between the offence of piracy *jure gentium* and those offences which are deemed to be piracy by municipal law (see the article MUNICIPAL LAW) should be borne in mind. Piracy *jure gentium* is justiciable in the Courts of any State; pirates may be lawfully captured on the high seas by the armed vessels of any particular State and brought within its territorial jurisdiction for trial in its tribunals. On the other hand, offences which by municipal legislation have been treated as piracy are triable and

punishable only by the Courts of the State within whose territorial jurisdiction and on board of whose vessels the offences so created were committed (see Wheaton, *International Law*, 4th Eng. ed., 1904, s. 124).

Certain acts may be regarded as piracy by the municipal law which do not constitute the offence of piracy by the law of nations. It is not, as Wheaton has pointed out (see *ibid.*), by the force of the international law that those who commit these acts are tried and punished, but in consequence of special laws which assimilate them to pirates, and which can only be applied by the State which has enacted them, and then with reference to its own subjects and in places within its own jurisdiction (see also Calvo, *Le Droit International*, 5th ed., 1896, ss. 488-492; Lawrence, *Principles of International Law*, 3rd ed., 1900, s. 123).

The offence of piracy and other offences which are assimilated thereto are dealt with in the following series of British statutes, dating from 1536 to 1878, namely:—

28 Hen. VIII. (1536), c. 15; 22 & 23 Car. II. (1670-71), c. 11; 11 Will. III. (1698-99), c. 7; Piracy Act, 1717, 4 Geo. I. c. 11, s. 7; Piracy Act, 1721, 8 Geo. I. c. 24; Piracy Act, 1744, 18 Geo. II. c. 30; 12 Geo. III. (1772), c. 20; 7 & 8 Geo. IV. (1826-27), c. 28, s. 2; 9 Geo. IV. (1827), c. 54, s. 8; Piracy Act, 1837, 7 Will. IV. and 1 Vict. c. 88, ss. 2-4; 5 & 6 Vict. (1842), c. 28, ss. 16-18; Piracy Act, 1850, 13 & 14 Vict. c. 26; Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73, s. 6.

Not resisting Pirates is an offence by a statute of the reign of Charles II. (22 & 23 Car. II. c. 11), whereby the master of any vessel of a burden not less than two hundred tons, and furnished with sixteen guns, is forbidden to yield his cargo to pirates or any force without resistance, on pain of being rendered incapable to take charge of any English vessel afterwards; and if the ship be released, and anything given by the pirates to the master, such gift and his share of the ship are to go to the owners of the goods. And any ship of less burden or force than before-mentioned is forbidden to yield to a Turkish pirate, not having double her number of guns, without fighting: "an extraordinary instance of the courage and skill," observes Abbott, "which the legislature of those times attributed to English seamen, and which the exploits of succeeding generations have so often and so gloriously exemplified."

Sec. 6 of the same statute provides that if the mariners or inferior officers of any English ship, laden with goods and merchandises as aforesaid, shall decline or refuse to fight and defend the ship when they shall be thereunto commanded by the master or commander thereof, or shall utter any words to discourage the other mariners from defending the ship, every mariner who shall be found guilty of declining or refusing as aforesaid, shall lose all his wages due to him, together with such goods as he hath in his ship and suffer imprisonment not exceeding the space of six months, and shall during such time be kept to hard labour for his or their maintenance.

More recent legislation makes it a misdemeanor punishable by imprisonment for six months for anyone being a commander, master, or any officer or seaman or mariner of any merchant ship which carries guns and arms who does not, when attacked by any pirate or by any ship on which any pirate is on board, fight and endeavour to defend

himself from being taken by such pirate, or who utters any words to discourage the other mariners from defending the ship, so that the ship falls into the hands of such pirate (Piracy Act, 1721, 8 Geo. I. c. 24, s. 6).

The Piracy Act, 1837, 7 Will. IV. and 1 Vict. c. 88, "An Act to amend certain Acts relating to the crime of piracy" repealed much of the old Acts. Sec. 2 enacted that whosoever with intent to commit, or at the time of or immediately before or immediately after committing the crime of piracy, in respect of any ship or vessel, shall assault with intent to murder any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

The sentence of death may be recorded (see 4 Geo. IV. c. 48, s. 1; see also the article CAPITAL PUNISHMENT).

For precedent of indictment for piracy with violence, see Archb. *Cr. Pl.*, 23rd ed., p. 545.

Sec. 4 of the Piracy Act, 1837, provided that in the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

Certain acts are deemed to be, and punishable as, piracy under the provisions of various statutes. Thus natural-born subjects or denizens of this kingdom who commit any piracy, robbery, or act of hostility against other of His Majesty's subjects on the sea under colour of any commission from any foreign Prince or State, or pretence of authority from any person whatsoever, are deemed to be pirates (11 & 12 Will. III. c. 7, s. 7). So the commission, during any war, of any hostility by any natural-born subject or denizen against the King's subjects upon the sea or other place within the jurisdiction of the admiral, or any adherence to or aid of the King's enemies upon the sea, or in any such place as aforesaid, is deemed to be piracy (Piracy Act, 1744, 18 Geo. II. c. 30; see also Piracy Act, 1721, 8 Geo. I. c. 24).

The Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73, s. 6, provides that, "This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

As to the indictment, evidence, and trial in cases of piracy by statute, see further, Archb., *Cr. Pl.*, 23rd ed., pp. 542-545; see also the articles FOREIGN ENLISTMENT; SLAVE TRADE.

Pirates, Rovers, and Thieves.—This is a common exception to the shipowner's liability in contracts of affreightment, and a peril insured against in the Lloyd's policy (see MARINE INSUR-

ANCE). The word "pirates" includes passengers who mutiny (*Naylor v. Palmer*, 1854, 8 Ex. Rep. 739), and rioters who attack the ship from the shore (*Nesbitt v. Lushington*, 1792, 4 T. R. 783; 2 R. R. 519; Marine Insurance Act, 1906, Sched. I. r. 8); and "pirates and rovers" include a mutinous crew who carry away the ship (*Brown v. Smith*, 1813, 1 Dow. P. C. 349; and see Arnould, 836). Loss by pirates is also covered by perils of the seas (*Pickering v. Barclay*, 1648, Sty. 132). "Thieves" does not cover clandestine theft, or a theft committed by any one of the ship's company, crew, or passengers (Marine Insurance Act, 1906, Sched. I. r. 9); the theft covered by the policy or exception is theft accompanied by violence (*latrocinium*), and not simple theft (*furtum*) (Arnould, 837). "Thieves" only means thieves external to the ship (*Taylor v. Liverpool & G. W. S. S. Co.*, 1874, L. R. 9 Q. B. 546). "Robbers" means not thieves, but robbers by force (Parke, B., *De Rothschild v. Mail Steam Packet Co.*, 1852, 7 Ex. Rep. 734); and "pirates, robbers, and thieves of whatever kind, whether on board or not, or by land or sea," do not cover thefts committed by persons in the service of the ship (*Steinman v. Angier Line*, [1891] 1 Q. B. 619).

An exception of robbers and thieves does not exclude the implied warranty that the ship is seaworthy for the purpose of the particular cargo, *e.g.* has a safe bullion-room (*Queensland National Bank v. P. & O. S. N. Co.*, 1897, 2 C. C. 228). But an exception in a passenger ticket against loss of property, etc., of passengers, whether occasioned by theft or robberies by persons in employ of the shipowner, protects the shipowner; and under the warranty his liability as regards articles kept by the passenger under his control is no more than it is in respect of the passenger himself, *i.e.* to use reasonable care (*Smittson v. Orient S. N. Co.*, 1907, 12 C. C. 270; and see *Acton v. Castle Mail P. C. Co.*, 1895, 1 C. C. 135, where clause "owners not to be liable for loss, etc., of luggage, and no jewellery, cash, etc., to be carried as luggage," protected shipowner against loss of jewellery and cash stolen on board); and see PASSENGER.

Piscary.—Common of piscary is a right of taking fish from a stream or pond belonging to another. For the distinction between common of piscary and other rights of fishery, see FISHERIES. The right may be enjoyed by copyholders, by the custom of the manor, but their possession of it does not preclude the lord from enclosing against common of pasture (see *Fawcett v. Strickland*, 1737, Willes, 57; and ESTOVERS). It has been held that in a manor where the right of fishing was possessed by the copyholders, the enfranchisement of a copyhold, accompanied by a release on the part of the lord of all rights of fishing and other rights regarding it, extinguished the right of the lord to make to other copyholders, on their enfranchisement, rights of fishings, and of passing over the land first enfranchised (*Tilbury v. Silva*, 1890, 45 Ch. D. 98; see also *Ecroyd v. Coulthard*, [1897] 2 Ch. 554). It was provided by sec. 82 of the Copyhold Act, 1841, 4 & 5 Vict. c. 35, that a commutation was not to affect the right to (among other things) piscaries, unless expressly commuted under the Act; but this Act is now repealed by the Copyhold Act, 1894, 57 & 58 Vict. c. 46). An enfranchisement does not, without the express consent in writing of the lord, affect his rights in respect of fishing (Copyhold Act, 1894, s. 23 (1)); the tenant's rights are impliedly defeated when the enfranchisement is effected apart from the Copyhold Acts, remaining unaffected when it is made under those Acts (1894 Act, s. 22; but see *Tilbury v. Silva and Ecroyd v. Coulthard*, *ubi supra*).

A claim by prescription for the freeholders of a manor to a free fishery or common of fishery in a river within the limits of a manor, is a right in the nature of a *profit à prendre* and is legally capable of proof. If the right be established, there may be presumed a grant from the lord to an individual of a right to fish in common with the other freeholders within the manor, accompanying each original grant of a freehold, or in the case of a royal manor a grant from the Crown incorporating the freeholders within the manor. A grant of a right to fish may be granted in common to the owners of several parcels of land, although the subsequent subdivision of the lands may lead to an indefinite increase in the number of persons entitled to exercise the right (*Lord Chesterfield v. Harris*, [1908] 1 Ch. 230).

See COMMON; COPYHOLD; FISHERY.

Pitcairn Island.—See PACIFIC ISLANDS.

Pixing the Coin.—See ASSAY.

Placard—(Fr. *Plaquart*).—In France it formerly signified a table, wherein laws, orders, etc., were written and hung up; in Holland, an edict or proclamation; it also signifies a writing of safe conduct; with us it is little used, but is mentioned as a licence to use certain games, etc., in the 2 & 3 Phil. & Mary, c. 9, and see 33 Hen. VIII. c. 6 (Toml. *Law Dict.*).

Place.—The meaning of the expression “place,” or “public place,” or “place of public resort,” or other similar expression, when it occurs in an Act of Parliament, depends upon the context, and upon the scope and object of the statute.

The Vagrant Act, 1825, 5 Geo. IV. c. 83, by sec. 4 provides, *inter alia*, that every person wilfully exposing to view, in any street, road, highway, or *public place*, any obscene print, picture, or other indecent exhibition; every person wilfully, openly, and obscenely exposing his person in any street, road, or public highway, or in view thereof, or in any *place of public resort*, with intent to insult any female; every person playing or betting in any street, road, highway, or other *open and public place*, at or with any table or instrument of gaming, or at any game or pretended game of chance; and every suspected person or reputed thief frequenting any street, etc., or any *place of public resort*, etc., with intent to commit a felony, shall be deemed a rogue and vagabond. Sec. 9 of the Act empowers Quarter Sessions upon an appeal under the Act to order the treasurer of the . . . place in which the offence shall have been committed to pay the prosecutor's costs. This operates to charge a borough only if it possess a separate Court of Quarter Sessions, otherwise the county pays (*R. v. JJ. of the West Riding*, [1900] 1 Q. B. 291). So also “place” in sec. 29 of the Alehouse Act, 1828, means a Quarter Sessions borough (*R. v. Warwickshire JJ.*, [1902] 2 K. B. 101). And the Vagrancy Amendment Act, 1873, 36 & 37 Vict. c. 38, s. 3, further provides that every person playing or betting by way of wagering or gaming in any street, road, highway, or other *open and public place*, or in any *open place to which the public have or are permitted to have access*, at or with any table or instrument of gaming, etc., shall be deemed a rogue and vagabond.

As to the meaning of “place” with respect to betting houses, horse-racing and other gambling, see BETTING HOUSE, Vol. II. p. 173.

A railway carriage is an "open and public place" within the meaning of the above sections, if, at the time when the offence is committed, it is travelling on its journey or being used for the conveyance of passengers, but not otherwise (*Langrish v. Archer*, 1882, 10 Q. B. D. 44; *Ex parte Freestone*, 1856, 25 L. J. M. C. 121). And a field which is private property, but where strangers are allowed to come and play, and are not turned away nor interfered with by the owner, is an "open place to which the public are permitted to have access" within the meaning of sec. 3 of the Act of 1873 (*Turnbull v. Appleton*, 1881, 45 J. P. 469). So, a private house in which a sale by public auction is held, is for the time being a "place of public resort" within the meaning of that part of sec. 4 of the Act of 1825 which deals with "frequenting" by suspected persons; and so is the platform of a railway station (*Sewell v. Taylor*, 1859, 29 L. J. M. C. 50; *Ex parte Davis*, 1857, 26 L. J. M. C. 178; 21 J. P. 280).

With regard to indecent exposure, any place to which the public are in the habit of resorting without being interfered with, though they have no legal right to do so, is a "public place" in which it is a misdemeanor at common law for any person indecently to expose himself to others (*R. v. Wellard*, 1884, 14 Q. B. D. 63); and so is any place (e.g. the roof at the back of a house) which, though not open to the public, is open to the view of a great number of persons (*R. v. Thallman*, 1863, 33 L. J. M. C. 58; 27 J. P. 790; see also *R. v. Saunders*, 1875, 1 Q. B. D. 15). So probably the open window of a private house fronting a public place or thoroughfare. So too, a urinal, built in compartments, at the side of a public footpath, and to which all persons passing along have the right to resort, is a "public place," so as to make an act of indecency committed therein, and witnessed by two persons, an indictable nuisance at common law (*R. v. Harris*, 1871, 40 L. J. M. C. 67; 24 L. T. 74; and see *R. v. Holmes*, 1853, 22 L. J. M. C. 122, where an omnibus was held to be a "public place" for the same purpose). It is questionable whether exposure to a number of persons on private premises would not be indictable; see Archbold, *Cr. Pl.*, 1905 ed., p. 1189. Persons bathing without covering near a public place so that they must necessarily expose themselves may be indicted for indecent exposure (*R. v. Reed*, 1871, 12 Cox. C. C. 1). Similarly it is an exposure to undress and bathe on the beach in view of houses (*R. v. Crunden*, 1809, 2 Camp. 89; 11 R. R. 671).

On the other hand, it has been held that a booth theatre, which is taken to pieces and carried from place to place, is not a house or other "place of resort" within the meaning of sec. 2 of the Act of 6 & 7 Vict. c. 68, prohibiting the keeping of any house or other place of public resort for the public performance of stage plays, etc., without a licence (*Davys v. Douglas*, 1859, 4 H. & N. 180; 28 L. J. M. C. 193; *Fredericks v. Howie*, 1862, 31 L. J. M. C. 249), though such a theatre is a "place" within the meaning of sec. 11 of the same Act, which imposes a penalty on every person who for hire acts or presents any part in any stage play, in any place not being a licensed theatre (*Fredericks v. Payne*, 1862, 32 L. J. M. C. 14; *Tarling v. Fredericks*, 1873, 21 W. R. 785; 28 L. T. 814; 38 J. P. 109).

A room to which persons paying for tickets are admitted for the purpose of witnessing a dramatic entertainment, is for the time being a "place of dramatic entertainment" within the meaning of secs. 1 & 2 of the Act of 3 & 4 Will. IV. c. 15, though such room is ordinarily used

for different purposes; the object of the Act being to secure to the author of any dramatic piece the sole right to represent or authorise the representation thereof at any place of public entertainment (*Russell v. Smith*, 1848, 12 Q. B. 217). But where a dramatic piece was represented in a room of a hospital, for the entertainment of the nurses, attendants, and others connected with the hospital, who were admitted free of charge, it was held that such room was not a "place of dramatic entertainment" within the meaning of the sections (*Duck v. Bates*, 1884, 13 Q. B. D. 843).

The word "place" in sec. 17 (2) of London Hackney Carriage Act, 1853, means any place to which the driver of a hackney carriage is required by a fare to drive, where he can gain admittance, even though such place may be private property, as, for instance, a railway station (*Ex parte Kippins*, [1897] 1 Q. B. 1).

In *Daly v. Webb*, 1869, Ir. R. 4 C. L. 309, it was held that diseased meat in a cart passing along a street was "deposited in a place" within the meaning of sec. 2 of the 26 & 27 Vict. c. 117; and in *Young v. Grattridge*, 1868, L. R. 4 Q. B. 166, that a yard at the back of a butcher's house was an "other place" within the meaning of sec. 3 of the same statute, which imposed a penalty for preventing an inspector of nuisances from entering any slaughter-house, shop, building, market or other place where any carcass, etc., was kept for sale or preparation for sale.

As to what is a "place of public resort" under the Town Police Clauses Acts, 1847 to 1889, see *Cole v. Coulton*, 1860, 29 L. J. M. C. 125 (prostitutes in a public-house). As to baiting animals, see sec. 36 of the Act of 1847.

As to the meaning of the word "place" in a contract of maritime insurance, see *Maritime Insurance Co. v. Alianza Insurance Co.*, [1907] W. N. 190.

As to what constitutes a place for "watching and besetting" purposes under the Conspiracy and Protection to Property Act, 1875, 38 & 39 Vict. c. 86, s. 7, see *Charnock v. Court*, [1899] 2 Ch. 35.

Place of Abode.—In the Act of 5 & 6 Will. iv. c. 76, which requires that on an election of borough councillors the voting papers shall state the place of abode of the voter, the expression "place of abode" means place of residence; and the place of business of a voter, if he does not reside there, is not his place of abode within the meaning of the Act, even if he is better known by his place of business (*R. v. Hammond*, 1852, 17 Q. B. 772). On the other hand, a notice of action to justices under the Act of 24 Geo. ii. c. 44, s. 1, is sufficiently indorsed with "the name and place of abode of the attorney" within the meaning of the section, if it is indorsed with his name and place of business, though he resides elsewhere (*Roberts v. Williams*, 1835, 2 C. M. & R. 561).

If a person has no fixed place of abode it is sufficient in the list of voters, and consequently in a claim, to insert the words "travelling abroad," as the Acts only require a place of abode to be stated where a person has one (*Walker v. Payne*, 1845, 2 C. B. 12).

A person may have two places of abode within the meaning of sec. 7 of the Act of 6 Vict. c. 18, and may state either of them in a notice of objection delivered pursuant to that section. Whether a house occupied by an objector, and which he uses occasionally, is or is not his place of abode within the meaning of the section, is a question of fact rather

than of law (*Courtis v. Blight*, 1861, 31 L. J. C. P. 48; *Sheldon v. Fletcher*, 1847, 93 1 Q. B. 124; 5 C. B. 17). Nor need the name of a town be added if the description is sufficiently clear (*Hicks v. Stokes*, [1893] 1 Q. B. 124).

As to the meaning of the expression "last place of abode" in sec. 3 of the Act of 7 & 8 Vict. c. 101, and in sec. 7 of the 12 & 13 Vict. c. 45, see *R. v. Evans*, 1850, 19 L. J. M. C. 151; *R. v. Damarell*, 1867, L. R. 3 Q. B. 50; *R. v. Brown*, 1859, 1 L. T. 29; 24 J. P. 5; *R. v. Higham*, 1857, 26 L. J. M. C. 116; 22 J. P. 6; *R. v. Lee*, 1888, 58 L. T. 386; 52 J. P. 345.

Within the meaning of the Bastardy Laws, which the above five cases have relation to, "last place of abode is the last known place of abode in England at which the defendant has been living." See Lushington's *Affiliation and Bastardy*, 1904 ed., pp. 25 *et seq.*, and LAST PLACE OF ABODE.

Place of Dramatic Entertainment.—See PLACE.

Place of Profit.—See OFFICE OF PROFIT.

Place of Public Resort.—See PLACE.

Place of Trial.—See TRIAL.

Plague.—See DISEASE; EPIDEMIC; INFECTIOUS DISEASES; PUBLIC HEALTH.

Plaint.—See COUNTY COURTS; MAYOR'S COURT.

Plan.

TABLE OF CONTENTS.

1. General	145	3. In Relation to Deeds and Con-	
2. Local Government	146	tracts	148
(1) Metropolitan Area	146	4. Evidence	148
(2) Outside the Metropolitan		5. Property in Plans	149
Area	146		

1. *General.*—In the Copyright Act, 1842, 5 & 6 Vict. c. 45, s. 2, the word is found associated with "map" and "chart," and in the London Building Act, 1894, 57 & 58 Vict. c. cxxiii., and by-laws thereunder, it is found associated with "drawing" and "section." As distinguished from a map or chart, the term "plan" is usually confined to a portion of a city or town, a group of streets, houses, or buildings, or one of these taken separately, a garden, a vessel, etc. Like a drawing, it implies some amount of delineation or design, and it is different from a section, which is rather a magnified drawing of a portion of the subject-matter of a plan. At the same time, the above words are often used as if synonymous, and it is not uncommon to find attached to a deed, and referred to therein as a plan, a map delineating the boundaries of land conveyed. A drawing of the nature of a plan must be upon paper, linen, or other similar substance, and its object generally is to define the position and relative proportions of the different parts of the subject of which it is a design.

Whether a drawing is a plan within the meaning of a statute, or other legal instrument, will depend upon the circumstances of each case.

Thus a cardboard pattern sleeve, containing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions, is not a "map, chart, or plan" within secs. 1 and 2 of the Copyright Act, 1842, though it might be the subject of a patent as an instrument or tool (*Hollinrake v. Truswell*, [1894] 3 Ch. 420).

2. *Local Government*.—(1) *Metropolitan Area*.—Under the by-laws relating to buildings, etc., in the metropolis, stringent regulations are laid down as to the plans required. The type of plan required under sec. 13 of the Act is explained by Lord Alverstone, C.J., in *London County Council v. Patman & Fotheringham*, 1903, 1 L. G. R. 519. Thus of the regulations published by the London County Council under the London Building Acts, of date November 8, 1904, Part II., is headed "Plans, Sections, and Particulars required in each Case." For new streets, plans are to be to the scale of 88 feet to the inch, and are to be accompanied by longitudinal sections to the same horizontal scale, but to a vertical scale of 11 feet to the inch, and by cross-sections to a scale of 22 feet to the inch. For buildings, plans are to be to the scale of 22 feet to the inch, and are to show the situation of the building in relation to others adjacent, and its height and precise distance from the centre of the roadway. As to spaces at the rear of domestic buildings and open spaces about working-class dwellings not on the public way, the plans are to be one-eighth of an inch to the foot, and are to show the height of the proposed building in every part, and are to be accompanied by a block plan to the scale of 22 feet to the inch, showing the adjoining premises. Plans of furnace chimney-shafts, projections, and temporary or wooden structures are also to be to a scale of one-eighth of an inch to the foot, and in most of these cases block plans to a scale of 22 feet to the inch must be furnished. See these by-laws set out in Emden's *Building, etc., Statutes*, 1907 ed., pp. 647 *et seq.*

Under the London Building Acts (Amendment) Act, 1905, 5 Edw. VII. c. ccix., s. 6, "plans" mean "plans, sections, and elevations." Under this Act (s. 7) certain newly constructed buildings, such as theatres, hotels, etc., cannot be erected unless designed according to the "fire escape plans" laid down by the County Council. See Emden, *supra*, p. 561; *London County Council v. Davis and Rowton House*, 1897, 77 L. T. 693; *Crow v. Davis* (No. 1), 1903, 89 L. T. 407; (No. 2) 1904, 68 J. P. 447.

Plans of sewerage must also be submitted and approved (see Metropolitan Management Amendment Act, 1890, 53 & 54 Vict. c. 66, s. 4). In all cases the Council's approval is signified in writing under the hand of the superintending architect, and the plans submitted become, on delivery to the district surveyor, the property of the Council (London Building Acts, 1894, ss. 194, 195; 1905, s. 27 (1)); but the Council's approval may be refused on sufficient grounds (s. 9, Act of 1894).

There is a right of appeal against the Council's refusal to sanction plans (Acts of 1894, s. 184; 1905, s. 22), and Rules of Appeal have been made under sec. 184 of the Act of 1894, which also apply to the Act of 1905. The office of the tribunal erected under these rules is 13A Great George Street, Westminster, S.W., and hearings of appeals are public. See Regulations made by the Lord Chancellor.

(2) *Outside the Metropolis*.—As to buildings and structures in the provinces, see the Public Health Act, 1875, 38 & 39 Vict. c. 55, ss. 157, 158; the Public Health Amendment Act, 1890, 53 & 54 Vict. c. 59, s. 23; and the Public Health Acts Amendment Act, 1907, 7 Edw. VII. c. 53.

The Act of 1907 extends to England, Wales, and Ireland (excepting London), generally as to Part I. Part II., which relates to streets and buildings, the plans connected with which this article is concerned, is put into operation by order of the Local Government Board or the Secretary of State as the case may be.

By sec. 15 the deposit of any plans or sections of any street or building in pursuance of any by-law in force in the district may by notice in writing to the person by whom the plans or sections have been deposited be declared by the local authority to be of no effect if the work to which the plans or sections relate is not commenced:—

As to plans and sections deposited before the section has been declared to be in force, within three years from the date of declaration;

As to plans and sections on or after the section has been declared to be in force, within three years of the deposit of the plans and sections.

When the deposit of any plans and sections has been declared to be of no effect, a fresh deposit shall be necessary before the work to which they relate is commenced.

The local authority is required to give notice of the section to persons laying out new streets or erecting new buildings.

By sec. 16 the local authority may retain all plans, etc., deposited with and approved by them in pursuance of any enactment for the time being in force in the district or of any by-law thereunder.

By sec. 17 the local authority may require the alteration of plans if they decide to vary the position or direction of new streets, but such variation must not entail on the owner affected any burden of purchasing additional lands. If any person is injuriously affected by the local authority acting under sec. 17 they are required to pay compensation.

By sec. 27 temporary buildings may not be erected before application is made to the local authority for permission to do so. The application must be accompanied by a plan and section and specifications of the materials to be used in the structure. Within one month after the delivery of plan, etc., the local authority must signify in writing its approval or disapproval to the person who made the application. The local authority may attach conditions as to sanitary arrangements and means of entrance and exit with reference to fire precautions, and the duration of the building. Any offence against the section may be dealt with summarily.

As to what is a sufficient plan, it was held that the plan to be submitted to a local authority of works to be done must not merely show method or manner, but be the equivalent of a map, so as to enable the authority to judge whether the proposal should be approved, *e.g.* under the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, s. 31, the position and depth of proposed pipes ought to form part of the plan (*Edgeware v. Colne Valley Water Co.*, 1877, 46 L. J. Ch. 889), and the plan ought to show the mode in which the underground work is intended to be executed (*East Molesey Local Board v. Lambeth Waterworks Co.*, [1892] 3 Ch. 289). And if after reasonable notice is given to the local authority of the steps proposed to be taken, they do not move in the matter they cannot afterwards interfere (*Montreal City v. Standard Light and Power Co.*, 1897, 66 L. J. P. C. 113; 77 L. T. 115). But a rural district council was held not entitled to reject building plans solely because they did not disclose a complete system of sewerage (*R. v.*

Tynemouth Rural District Council, [1896] 2 Q. B. 451). And if plans have been approved and works have been executed under them, the fact that the compensation offered has not been accepted will not entitle a local board subsequently to alter their approval (*Masters v. Pontypool Local Government Board*, 1878, 9 Ch. D. 677). A person depositing plans cannot, after such deposit, substantially alter them, even though there is no by-law to the contrary (*James v. Masters*, [1893] 1 Q. B. 355), but plans deposited in pursuance of by-laws may be abandoned instead of carrying them out, and work of a different nature may be done so long as no other by-laws are infringed (*Sunderland Corporation v. Skinner*, 1889, 53 J. P. 660). If a building is in process of erection according to plans passed by the local authority, there must be no substantial deviation from such plans (*Balby-with-Heathorpe U. D. C. v. Millard*, 1903, 68 J. P. 81; 2 L. G. R. 330). When buildings have been erected according to plans approved by a local board, there is no right of action in the owner of houses opposite for an alleged encroachment upon a street, either in name of the Attorney-General against the local board or against the alleged trespasser (*A.-G. v. Pudsey Local Board*, 1895, 59 J. P. 329).

No action lies against a local authority for its malicious refusal to approve of building or drainage plans deposited with it. The legislature intended that the local authority should use its discretion. The remedy is by mandamus to the local authority to hear and determine the matter (*Davis v. Bromley Corporation*, [1908] 1 K. B. 170).

3. *Plans in Relation to Deeds and Contracts*.—If a plan is referred to in a deed by way of description, the effect will generally be to incorporate it as part of the deed (*Nene Valley Drainage Commissioners v. Dunkley*, 1876, 4 Ch. D. 1), and it will, generally, control the written description. So too in a sale by auction even where a plan contained a note "This plan is simply prepared as a guide to intending purchasers, and its accuracy in regard to area, measurements, abutments, or otherwise is in no way guaranteed," it was held to form part of the contract (*In re Lindsay and Forder's Contract*, 1895, 77 L. T. 832); also if an Act directs compliance with deposited plans and sections they are regarded as embodied in the statute (*Edinburgh Street Tramways Co. v. Black*, 1873, L. R. 2 H. L. Sc. 336). Though the plan is hardly quite specific, it will have to be carried out according to the presumed intention of the parties (*Compton v. Richards*, 1814, 1 Price, 27). Care should therefore be taken to make plans as exact as possible, and if, on a sale the purchaser is misled, through some material mistake in the plan of the estate sold, and there is nothing from which constructive notice can be inferred, the contract will not be enforced against him (*Denny v. Hancock*, 1870, L. R. 6 Ch. 1; cp. *Hunter v. Walters, Curling v. Walters, Darnell v. Hunter*, 1871, L. R. 7 Ch. 75). A plan may even be read along with a deed in which there is no reference to it, if it appears that the intention of the parties was that it should be treated as part of the transaction, as, for example, where the plan is indorsed "plan of property sold to and purchased by D., October 23, 1874. N.B.—The property included in the purchase is edged with red colour" (*Nene Valley Drainage Commissioners v. Dunkley*, *supra*).

4. *Evidence*.—Old maps, plans, etc., are frequently admissible as evidence against, though not, as a rule, for, persons claiming under former proprietors (cp. *R. v. Milton Inhabitants*, 1843, 1 Car. & Kir. 58). Generally speaking, however, they are only of use as supplementary to

parol evidence. In the latter case, if found useful, the costs thereof on the higher scale may be allowed (*The Robin*, [1892] P. 95). Should the issue depend much on the state of the plans, but, through the ignorance of one of the parties, they are useless without the aid of an expert, an order may be made for inspection by a surveyor on that party's behalf (*Swansea Vale Rly. Co. v. Budd*, 1866, L. R., 2 Eq. 274). Field-book entries made by a deceased surveyor for the purpose of a survey upon which he was professionally employed are admissible as evidence as being made in the discharge of a professional duty within *Price v. Earl of Torrington*, 1703, 1 Salk. 285 (*Mellor v. Walmsley*, [1905] 2 Ch. 164). The deposited plans of a railway scheme, though the scheme never be carried out, are admissible as evidence of reputation on the question whether there was or was not a public road across two fields shown on the plan (*A.-G. v. Antrobus*, [1905] 2 Ch. 188). As to when plans of Crown or Government property are capable of production in evidence either generally or to prove particular facts, see *Mercer v. Denne*, [1905] 2 Ch. 538. Plans put in to show highway diversion or alteration must sufficiently "describe the old and proposed new highways by admeasurement thereof" and the length of the old and new highways must be stated thereon and the plans properly marked (*R. v. Surrey JJ.*, [1908] 1 K. B. 374).

As to plans acted upon by railway companies, merely technical objections will not be allowed (*A.-G. v. Great Eastern Rly. Co.*, 1873, L. R. 6 H. L. 367); but if the land in respect of which an objection is raised is not included in the plans, or if an attempt is made to get the land for totally different purposes from those in respect of which the plans were approved, an injunction will issue (*Lamb v. North London Rly. Co.*, 1869, L. R. 4 Ch. 522). Though plans are presented, there is no implied warranty that the works proposed can be successfully executed, so as to render the contractor liable in damages (*Thorn v. Mayor and Commonalty of London*, 1876, 1 App. Cas. 120).

5. *Property in Plans.*—As detailed above plans deposited with the local authority usually remain the latter's property. An architect employed by a private person and paid according to the usual trade custom by a percentage on the outlay is not entitled to retain the plans as these are, the custom of his trade notwithstanding, the property of his employer (*Gibbon v. Pease*, [1905] 1 K. B. 810).

Plant.—The term "plant" indicates primarily materials or instruments which are used for the purpose of carrying on a business, and without which such business cannot be carried on (*per* Lord Esher in *Yarmouth v. France*, 1887, 19 Q. B. D. 647). So it will include the fixtures, tools, apparatus, and machinery necessary for that purpose, though not the stock-in-trade or household furniture and effects of the ordinary kind (*Blake v. Shaw*, 1860, 8 W. R. 410). It does not seem confined, as some dictionaries put it, to mechanical trades; and where a bequest was worded to be of "the goodwill of my business in A. Street and also the plant," the leasehold premises used solely for business purposes were held to pass (*Blake v. Shaw, supra*).

Special meanings may, however, be applied to it, either expressly or impliedly from the circumstances of its usage. Thus in the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, s. 6, subs. 2, the word "plant" is associated with trade machinery, and further qualified by the words "used in, attached to, or brought upon any land, farm, factory, workshop,

shop, house, warehouse, or any other place in substitution for any of the like plant." Under that section, horses not used for business purposes, though on the premises, were held not to be plant, the judges, however, carefully refraining from saying that they might not be plant in other cases (*London and Eastern Counties Loan and Discount Co. v. Creasy*, [1897] 1 Q. B. 768). So, under the Employers' Liability Act, 1880, 43 & 44 Vict. c. 42, ss. 1 (1) and 2 (1), where the words are "plant used in the business," it was said that horses, carts, waggons, etc., might form a material part of the plant (*Yarmouth v. France*, *supra*). A ladder used to support scaffolding, though that is not its proper use, is part of the plant in respect of a defect in which an action will lie under these sections (*Cripps v. Judge*, 1884, 13 Q. B. D. 583). See further, EMPLOYERS' LIABILITY.

Plantation.—This term implies a wood of some description, generally of young trees, as distinguished from a forest or collection of timber trees. The latter term includes trees of upwards of twenty years' growth (*Aubrey v. Fisher*, 1809, 10 East, 446; *Brook v. Rogers*, 1604, Cro. Jac. 100; 79 E. R. 86; and see **TIMBER**). The term, however, is frequently found in the wider sense of a wood generally, as when "ornamental plantations" are spoken of (see *Shotts Iron Co. v. Inglis*, 1882, 7 App. Cas. 518). A more definite distinction is drawn between plantations and coppice woods or underwoods. Thus in the Rating Act, 1874, 37 & 38 Vict. c. 54, s. 4, plantations, woods, and lands used for the growth of saleable underwood are separately mentioned, and it is enacted that if land is used for a plantation or wood it shall be rated as if let and occupied in its natural and unimproved state, but if land is used for the growth of saleable underwood it shall be rated as if let for that purpose; while if both purposes are found combined, the Assessment Committee may rate it either as a plantation or wood, or as land used for the growth of underwood (see **UNDERWOOD**). What is a plantation? will be a question of fact in every case, depending, like the term "saleable underwood," on the mode or object of cultivation (cp. *Lord Fitzhardinge v. Pritchett*, 1867, L. R. 2 Q. B. 135; *R. v. Narberth*, 1839, 9 Ad. & E. 815; 48 R. R. 718; *R. v. Ferrybridge*, 1823, 1 Barn. & Cress. 375; 25 R. R. 411). A devise of a West India plantation will, it seems, pass also the stock, implements, utensils, etc., upon it (*Lushington v. Sewell*, 1827, 1 Sim. 435; 57 E. R. 641).

Plantations Abroad.—See **BOARD OF TRADE**; **COLONY**.

Plants.—As to larceny of, or injury to, plants, see Vol. VIII. pp. 53, 511.

See also sec. 52 of the Malicious Damage Act, 1861, as to damage generally to real or personal property, which section will apply in case the damage is less than one shilling. The Act, however, does not apply to picking wild flowers, or digging up or taking uncultivated plants, such as mushrooms growing spontaneously (*Gardner v. Mansbridge*, 1887, 19 Q. B. D. 217). But see sec. 16 as to furze, heath, etc. Malicious damage to a hay field by walking over it after warning not to trespass has been held to be within the section (*Gayford v. Chouler*, [1898] 1 Q. B. 316; cp. *R. v. Hexham JJ.*, 1887, 3 T. L. R. 465). The damage done must be actual, not merely constructive (*Eley v. Lytle*, 1885, 50 J. P. 308). Express malice need not be proved, for want of reasonable grounds for

believing in the existence of a right to do the act complained of will be sufficient (*White v. Feast*, 1872, L. R. 7 Q. B. 353).

Plate.—1. *Hall Marks on Gold and Silver Goods.*—The regulations as to the marking of gold and silver plate, and the penalties (7 & 8 Vict. c. 22) for offences in relation thereto, are contained in a great number of statutes (see the Index to the Statutes, *Plate*). The following are the more important provisions:—Gold and silver goods must be marked with the *initials* of the worker (12 Geo. II. c. 26, s. 5), and the *assay mark* of the town where they were made, or (if not made in an assay town) where they were marked (2 Hen. VI. c. 17, London; 12 & 13 Will. III. c. 4, York (now discontinued), Exeter, Bristol (never used), Chester and Norwich (now discontinued); 1 Anne, c. 3, Newcastle-on-Tyne; 13 Geo. III. c. 52, Sheffield; 5 Geo. IV. c. 11, s. 1, *local*, Birmingham), and also the *variable* or date mark to show the year of marking (12 & 13 Will. III. c. 4, s. 3; 12 Geo. II. c. 26, s. 5). The variable mark is a letter. In addition, there must be marked on gold wares of 22 or 18 carats' fineness, the *standard* or quality marks of a crown and 22 (7 & 8 Vict. c. 22, s. 15), or a crown and 18 (38 Geo. III. c. 69, s. 2) respectively; and on silver wares of 11 oz. 10 dwts., and 11 oz. 2 dwts. fineness, the standard marks of Britannia, and a lion *passant* respectively (6 Geo. I. c. 11, s. 41; 12 Geo. II. c. 26). Before the abolition of the duty on plate (53 & 54 Vict. c. 8, s. 10) a *duty* mark must also have been added to 22 or 18 carat gold, and to silver goods. It was the King's head (24 Geo. III. sess. 2, c. 53, s. 5). See also below, No. 5, origin must be declared when plate is brought to be marked.

2. *Exemptions.*—A number of small articles are exempted from marking, viz., chains, necklace beads, lockets, filigree work, shirt buckles or brooches, stamped medals, and spouts to china, stone, or earthenware teapots, of any weight (30 Geo. III. c. 31, s. 3); tippings, swages, or mounts, not exceeding 10 dwts. of silver each, except only necks and collars for castors, cruets, or glasses appertaining to any sort of stands or frames (*ibid.*, s. 4); silver goods not weighing 5 dwts., except neck collars and tops for castors, cruets, or glasses appertaining to any sort of stands or frames, buttons to be affixed or set on any wearing apparel, solid sleeve buttons, and solid studs, not having a bisseled edge soldered on, wrought seals, blank seals, bottle-tickets, shoe-clasps, patch-boxes, salt-spoons, tea-spoons, tea strainers, buckles (the shirt buckles or brooches before mentioned excepted), and pieces to garnish cabinets, or knife-cases, or tea-chests, or bridles, or stands, or frames (*ibid.*, s. 5). See also below, 5.

3. *Gold wedding-rings* are to be assayed and marked as gold plate (18 & 19 Vict. c. 60).

4. *Fineness.*—Before 1854 gold wares were required to be of either 22 or 18 carats' fineness (38 Geo. III. c. 69). By an Act of that year (17 & 18 Vict. c. 96) any other standards for gold plate, not being less than one-third part of the whole in fine gold, may be authorised by Order in Council. The order may specify any instrument for stamping or marking the wares, setting forth in figures the actual fineness thereof according to the standard declared. Under this Act, the 9, 12, and 15 carat gold standards have been introduced.

Silver wares must be of the standard of 11 ozs. 10 dwts., or 11 ozs. 2 dwts. of silver to the pound troy (6 Geo. I. c. 11).

5. *Foreign Plate.*—Imported foreign plate, not being battered, except

ornamental plate made before 1800 (5 & 6 Vict. c. 56, s. 6), must be of a recognised standard fineness, and must be assayed and marked (5 & 6 Vict. c. 47, s. 59; 46 & 47 Vict. c. 55, s. 10) in such manner as may be determined by Order in Council so as readily to distinguish whether the plate or other article was wrought or made in the United Kingdom or was imported from foreign parts (Hall Marking of Foreign Plate Act, 1904, 4 Edw. VII. c. 6). Gold and silver watch-cases forming parts of finished watches imported from abroad are gold and silver plate within the meaning of the Customs Act, 1842, 5 & 6 Vict. c. 47, s. 59 (*Goldsmiths' Co. v. Wyatt*, [1907] 1 K. B. 95). But articles which, in the opinion of the Commissioners of Customs, are hand-chased, inlaid, bronzed or filigree work of Oriental pattern, are exempt from assay (47 & 48 Vict. c. 62, s. 4). An Order in Council was made October 24, 1904 (St. R. & O., 1904, p. 584), and its schedule specifies for foreign material the hall-mark particular to each assay office (specified therein), together with the carat value of the gold, and together with the decimal equivalent of the carat value; and as to silver, the hall-mark (specified therein), together with the decimal equivalent of the standard value of the silver. It will be noted that the "lion" mark is no longer to appear, nor the former "F" mark.

Any person bringing plate to any assay office to be stamped must declare its origin (see Form, *infra*), stating whether it was made or wrought in England, Ireland, or Scotland, or imported from foreign parts, which latter term, for the purposes of this Act, includes any place outside the United Kingdom (*ibid.*, s. 1 (2)). If no origin is declared, the plate will be marked as foreign (*ibid.*, (3)). Knowingly making a false statement as to origin is an offence (*ibid.*, (4)).

By the Finance Act, 1907, 7 Edw. VII. c. 13, s. 5, notwithstanding anything in sec. 10 of the Revenue Act, 1883, and subject to the conditions there set forth, gold and silver plate imported into Great Britain or Ireland may be delivered into the hands of the officers of any assay office selected by the importer, though it be not the assay office nearest to the port of importation, and may, upon security being given to the satisfaction of the Commissioners of Customs, be removed to the Assay Office without being in charge of an officer of customs.

Foreign watch-cases stamped at an assay office in the United Kingdom are marked with the word *foreign* and a cross-shaped (for gold) or octagon-shaped (for silver) shield (Merchandise Marks Act, 1887, s. 8; Order in Council, November 28, 1887), but if imported from foreign parts into the United Kingdom before June 1, 1907, are exempted from assay (Assay of Imported Watch Cases Act, 1907, 7 Edw. VII. c. 8).

6. *Plated Goods*.—Makers of plated goods in Sheffield, or within one hundred miles thereof, are authorised to strike on the goods their surnames, or the names of their firm, with a mark (not being an imitation of an assay mark), which is approved by the guardians of the Assay Office and registered (24 Geo. III. sess. 2, c. 20, ss. 2, 3).

7. *Licences* are required for trading, selling, taking in pawn, or refining gold or silver, except lace, wire, thread, or fringe (30 & 31 Vict. c. 90; 51 & 52 Vict. c. 8, s. 9 (2); see EXCISE, Vol. V.). Persons who deliver coupons with packets of tea, such coupons being exchangeable for gold watches as prizes, are trading in and selling plate, and require a licence (*Scott v. Solomon*, [1905] 1 K. B. 577).

8. *Weight*.—Sales must be by the ounce troy (41 & 42 Vict. c. 49, s. 20).

9. *Legacy Duty*.—As to exemption from this, see DEATH DUTIES, Vol. IV. p. 358.

[*Authorities*.—Summaries of the statutes relating to plate marks are given in Safford on *Merchandise Marks*, and Sebastian on *Trade Marks*. See also WATCHES.]

FORM.

Statement to be made in writing by manufacturers, dealers, and others bringing or sending plate or other articles to be assayed and marked.

[*Here set out a list of the articles.*]

I, _____ of _____, hereby certify that all the above-mentioned articles were wrought and made in [*England, Ireland, or Scotland, or were imported from foreign parts,*¹ *as the case may be*].

[*Or, I hereby certify and declare that the place of origin and manufacture of the above-mentioned goods is unknown*² *to me.*]

(*Signed*)

.3

¹ "From foreign parts," for the purposes of this Act, includes any place outside the United Kingdom.

² If this declaration be made, then the goods are treated as of foreign origin.

³ To be signed by a member of the firm, or, in the case of a company, by the managing director or secretary.

Play-debt.—See GAMING (AND WAGERING).

Play-grounds.—See OPEN SPACES; PLEASURE GROUNDS.

Plea.—The various legal senses in which this term is used will be found dealt with under such headings as ABATEMENT; BAR, PLEA IN; DEMURRER; DILATORY PLEA; JUSTIFICATION; PLEADING.

Pleading; Pleadings.

TABLE OF CONTENTS.

Before the Judicature Acts—

(a) Common Law	154
(b) Chancery	159

Under the Judicature Acts—

I. CHANGES INTRODUCED BY THE JUDICATURE ACT	161
(i.) Forms of Action	162
(ii.) Conclusions of Law not to be Stated	162
(iii.) General Issue abolished	162
(iv.) Demurrers abolished	162
(v.) Pleas in Abatement abolished	163
(vi.) Equitable Relief granted	163

(vii.) Payment into Court permitted in every Action	163
(viii.) Counterclaims allowed	163
(ix.) Third Parties may be introduced	163
(x.) Names of principal pleadings changed	163

II. OUR PRESENT PLEADINGS	163
Leave to plead	163
Time	164
Function of pleadings	164
Matters of Form	164

III. FUNDAMENTAL RULE OF MODERN PLEADING	165
(i.) Material Facts only	165
(ii.) Facts and not Law	166

(iii.) Facts and not Evidence	166	(c) Denials must be specific	171
(iv.) Material Facts must be stated in a Summary Form	167	Exceptions to this rule	172
(a) Brevity	167	(iii.) Confession and Avoidance	172
(b) Certainty	168	Equitable Defences	172
IV. STATEMENT OF CLAIM	168	Matter arising since Writ	172
Parties	168	Payment into Court	173
Joinder of Causes of Action	168	Default of Defence	174
Drafting a Statement of Claim	169	VI. SET-OFF AND COUNTERCLAIM	174
V. DEFENCE	169	Set-off	174
1. Attacking the Statement of Claim	169	Counterclaim	175
2. Answering the Statement of Claim	170	Present distinction between Set-off and Counterclaim	177
(i.) Objections in Point of Law	170	Counterclaim by a Plaintiff, etc.	178
(ii.) Traverses	171	VII. REPLY, ETC.	178
(a) Everything not denied is admitted	171	Is any Reply necessary?	179
(b) Denials must not be evasive	171	Reply and Defence to Counterclaim	179
		Rejoinder, etc.	179
		VIII. TRIAL WITHOUT PLEADINGS	180
		<i>In Criminal Cases</i>	181

Before the Judicature Acts—(a) *Common Law*.—Pleadings were originally *viva voce* statements made in the presence of the judges. The writ was returned, read in Court, and the plaintiff's counsel expanded the plaint into a connected story, adding time, place, etc. This was called a "*conte*," from the French word meaning story or narrative (Pollock and Maitland, *Hist. Eng. Law*, ii. p. 602). The defendant's counsel stated the defence in a "*plea*" (from the French *plée*). The plaintiff's counsel then replied, and the defendant in turn rejoined. When either party considered the statement of his opponent untrue, he denied it, and was said to take issue on it; and if he considered it insufficient in law, he demurred to it (see DEMURRER, Vol. IV. p. 502), and the parties were then described as being at issue, that is to say, at the end of their pleading. A minute of the pleadings was made on a parchment roll, which was called the Record. If the issue was one of fact, the judges directed it to be tried by a jury; and if it was one of law, they decided it themselves. The pleadings were made orally until about the middle of the reign of Edward III., when this practice was superseded by delivering pleadings in writing, which were in the first instance entered upon the parchment rolls by the pleaders of each party. Subsequently, in the reign of Edward IV., the practice was adopted of writing them on paper and delivering them between the parties before entering them on the record (3 Reeves, p. 427; Stephen on *Pleading*, 7th ed., pp. 24-29; Odgers on *Pleading and Practice*, 6th ed., pp. 72-74).

William the Conqueror ordained that pleadings should be in French (Bacon's *Abr.*, "Pleas and Pleadings," 6th ed., vol. v. p. 321). In the reign of Edward III., it was enacted by statute that all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue, but be entered and enrolled in Latin (36 Edw. III. c. 15). Latin afterwards continued in use until the time of Cromwell, when English was adopted. On the restoration of Charles II. Latin was again resorted

to, and remained in use until the passing of the 4 Geo. II. c. 26, which directed that all proceedings should be in English.

Declaration.—Prior to the coming into operation of the Judicature Acts, the pleadings in the Courts of common law commenced with the declaration, which was a statement on the part of the plaintiff of the facts on which his cause of action depended. The delivery of this pleading was necessary to the continuation of the action, for if the plaintiff failed to deliver it within the prescribed time, the defendant was entitled to sign judgment of *non pros.* (*non prosequitur*) against him. The declaration, when delivered, had to correspond with the writ with respect to the names and number of the parties to the action, the character or right in which they sued or were sued, and the cause of action (1 Chitty on *Pleading*, 7th ed., p. 265).

The statement of each separate cause of action in the declaration was termed a "count" (see COUNT IN DECLARATION). Each count had to contain an entire cause of action in itself. If it disclosed two causes of action it was bad for doubleness, or *duplicity* as it was called. Formerly, when variances between the evidence and the record could not be amended, a declaration might, subject to certain restrictions, have contained several counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only. When, however, various powers of amendment were granted by statutes (such as 9 Geo. IV. c. 15, and 3 & 4 Will. IV. c. 42, s. 23), several counts were no longer permitted, unless a *distinct subject-matter of complaint* was intended to be established in respect of each count (see Pleading Rules, Hilary Term, 4 Will. IV. r. 5), or unless on application to the Court or a judge to strike out any count on the ground of such count being in violation of the last-mentioned rule, the Court should consider such counts proper for the determining the real question in controversy (see *Regulæ Generales*, Trinity Term, 1853, rr. 1, 2).

Personal actions at common law were divided into seven classes; three of contract—debt, covenant, and assumpsit; and four of tort—detinue, trespass, trespass on the case (which included trover), and replevin. Prior to 1852, counts in contract could not be joined with counts in tort; and, with certain exceptions, counts in one class of action could not be joined with counts in another. Thus, for instance, *assumpsit* could not be joined with trover, nor could trespass with case, and *assumpsit*, covenant, or debt could not be joined with each other. These restrictions were removed by the Common Law Procedure Act, 1852, which enacted that causes of action of whatever kind, provided they were by and against the same parties and in the same rights, might be joined in the same suit; but this did not extend to replevin or to ejectment (15 & 16 Vict. c. 76, s. 41).

In declaring on a special contract as distinct from an *indebitatus* count (see COUNT IN DECLARATION), the body of the declaration in general consisted of the statement of the contract, the averments of the performance of all conditions precedent to the right of action, and the assignment of the breach of the contract, and it concluded with the statement of the special damage, if any existed. If the special count was framed upon a simple contract, it was essential that it should show that there was a valid consideration to support the defendant's promise. In actions for wrongs, on the other hand, the declaration in general stated, first, the matter or thing affected; secondly, the plaintiff's right thereto; thirdly, the injury; and fourthly, the damage sustained by the

plaintiff. Where the right was one implied by law, it was unnecessary to state the origin or creation of such right, but only to state the violation of the right, as, for instance, that the defendant "assaulted and beat the plaintiff." Where, however, the right alleged to have been violated was one not implied by law, but was a legal conclusion from certain facts, it was necessary to state those facts before alleging the violation of the right. Both in actions of contract and of tort, the declaration commenced by naming in the margin of the pleading the "venue," that is, the county in which the action was to be tried (see VENUE), and concluded with a claim for damages, or other relief. Where it was necessary for the purpose of explaining or introducing the contract or the circumstances creating the right alleged to have been infringed, certain prefatory statements were allowed, which were called *matters of inducement*.

After the plaintiff had delivered his declaration, and had given notice to the defendant to plead, it was incumbent on the defendant to deliver his *pleas* as they were termed, within the time prescribed by the rules, otherwise the plaintiff might sign judgment of *nil dicit* for default of pleading. Where the defendant had no real defence to the action, and wished to come to terms with the plaintiff (*e.g.* as to the allowance of a certain time for payment of the debt or damages claimed), and yet was anxious to avoid having judgment signed against him in default of pleading, he could give the plaintiff a written confession of the action, which was called a *cognovit* (see COGNOVIT ACTIONEM). If the defendant had pleaded before delivering this confession, the *cognovit* usually contained an agreement to withdraw the plea, and it was then termed a *cognovit actionem relictâ verificatione* from the form of entry of it upon the roll.

Each separate plea had to be a complete answer to the whole or some separate cause of action. Any plea which contained two answers to the same cause of action was bad for *duplicity*. Any plea which was inconsistent with itself was bad for *repugnancy*; but there was no objection to one plea being inconsistent with any other plea. Pleas were generally divided into two classes, *viz.*—First, dilatory pleas, and second, peremptory pleas, or pleas in bar.

Dilatory pleas tended to delay the suit; they did not answer the cause of action, but merely offered a formal objection to the proceedings. They included (*a*) pleas to the jurisdiction, by which the defendant objected to the jurisdiction of the Court, and prayed judgment whether the Court could or would take further cognisance of the action; and (*b*) pleas in abatement, by which the defendant, without admitting or denying the cause of action, alleged some ground which precluded the plaintiff from recovering upon the writ and declaration as framed, as, for instance, the non-joinder of a necessary party; and then concluded by asking that the writ and declaration should be quashed. Pleas in abatement were formerly often used without justification for mere purposes of delay, but this practice was to a considerable extent frustrated by 4 Anne c. 16, s. 11, which required that all pleas in abatement should be verified by affidavit, and by 3 & 4 Will. iv. c. 42, s. 8, which enacted that no plea in abatement of the non-joinder of a person as a co-defendant should be allowed, unless it stated that such person was resident within the jurisdiction of the Court, and unless the place of residence of such person was stated with reasonable certainty in an affidavit verifying such plea.

Pleas in bar were pleas that went to the merits of the case. They answered the alleged cause of action, and showed some ground for barring or defeating it. Pleas in bar included *traverses*, which denied facts stated in the declaration which were material to the cause of action, and pleas in *confession and avoidance*, which, whilst admitting such facts, alleged new facts which avoided their effect.

(a) Traverses consisted, first, of general denials which traversed the principal facts on which the declaration was founded, and were known as *general issues*, such as the pleas of *nunquam indebtedatus*, *non assumpsit*, *non est factum*, and *nul tiel record* in actions on contracts, and *Not guilty*, *non detinet*, *non cepit*, in actions of tort (see GENERAL ISSUE); and secondly, of specific denials of some particular allegation in the declaration, and these were called *common traverses*.

(b) Pleas in confession and avoidance consisted of pleas in justification or excuse and pleas in discharge. The former showed that the plaintiff never had any cause of action, as, for instance, the plea in an action for libel or slander, that the words were true in substance and in fact; and the latter stated facts which showed a subsequent discharge of a once subsisting cause of action, as, for instance, in an action for the recovery of a debt that the defendant had satisfied the plaintiff's claim by payment before action.

If the defence by way of satisfaction or discharge arose before action, it was pleaded in bar generally, but if it arose after action and before plea, it was pleaded to the *further maintenance of the action*, and if after plea, it was pleaded as *puis darrein continuance*, or having arisen since the last entry was made on the record.

Estoppel.—Another form of plea in bar was a plea in *estoppel*. It was pleaded in cases where a party was precluded from alleging a fact in consequence of his own previous act or allegation to the contrary. It arose either from matter of record or deed, or from matter of fact *in pais* (see ESTOPPEL). The form of plea stated that the plaintiff ought not to be admitted to say that which the defendant contended that he was estopped from saying, and after giving a reason for the estoppel, and stating that the defendant was ready to verify it, concluded by praying judgment if the plaintiff ought to be admitted against the matter of estoppel to say that which the defendant contends he is estopped from saying (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 450).

Set-Off.—Formerly the defendant in an action at law could not plead, by way of set-off against the claim of the plaintiff, debts due to him from the plaintiff, but after the passing of the Statutes of Set-off (2 Geo. II. c. 22, and 8 Geo. II. c. 24), where the claims on both sides were liquidated debts or money demands which could be ascertained with certainty at the time of pleading, the defendant might by his pleading set off the amount claimed by him against a like amount of the plaintiff's claim. A set-off could not, however, be pleaded where the claim on either side was for unliquidated damages.

Demurrer.—If the declaration was on the face of it defective in substance or form, the defendant might in general demur, that being the formal mode of disputing the sufficiency in law of the pleading. The effect of demurring was to admit for the purposes of the demurrer that the matters of fact alleged in the declaration were to be taken as true, but at the same time to deny that they were sufficient in their legal effect to support the claim set up by the other side. At one time a

defendant could not plead and demur to the same pleading, but by sec. 80 of the Common Law Procedure Act, 1852, either party might, by leave of the Court or a judge, plead and demur to the same pleading at the same time (see DEMURRER).

Discontinuance.—If the plaintiff on delivery of defendant's pleading found that he could not by amendment of the declaration or otherwise support the action, he might either obtain leave to discontinue, or enter a *nolle prosequi* to the whole or any severable part of the cause of action; or, where the defendant pleaded a plea in abatement, the plaintiff might enter on the roll a *cassetur breve* (i.e. "let the writ be quashed"), and commence another action against the original defendant along with those named in the plea. But subsequently to the passing of the Common Law Procedure Act, 1852, this became unnecessary in practice (15 & 16 Vict. c. 76, ss. 34-38). If the plaintiff failed to reply or to take any of the steps above indicated, the defendant was at liberty to sign judgment of *non pros.* against him; but if he elected to plead in reply to the defendant's pleas, such pleading was called a Replication.

Replication, etc.—Where the plaintiff by his replication objected to any plea of the defendant on the ground that it showed no defence in law to the plaintiff's claim, he demurred to it, or where he relied on any matter of estoppel he replied by way of estoppel. If he disputed the facts alleged in the plea, he traversed it by a joinder of issue which operated as a denial of the substance of the plea; or if he admitted the facts, but sought to avoid their effect by the averment of some new matter, he replied by way of confession and avoidance. Another form of replication occurred in cases where the defendant's plea mistook the cause of action, or restricted it to narrower limits than the plaintiff intended. In such cases it became necessary for the plaintiff to restate his cause of action. This form of replication was called a *new assignment*. It stated that the plaintiff proceeded for another cause of action than that admitted by the defendant's pleading, and such other cause of action had necessarily to be one within the terms of the declaration, as otherwise it would have been demurrable on the ground of *departure*. A departure was an abandonment by the party pleading of the ground of action or defence adopted by him in his previous pleading, and the taking up of another ground in a subsequent pleading; this was never allowed. When a new assignment was delivered, the defendant pleaded to it as to a declaration, so that new assignments were often pleaded for the purpose of delaying the proceedings and gaining further time. For instances of new assignments, see Bullen and Leake's *Precedents of Pleadings*, 3rd ed., pp. 656, 755.

In most cases the pleadings were closed by the replication raising an issue of fact or of law on the defendant's pleas without adding any other reply, but, until they were so closed, they proceeded, each party pleading in turn in like manner, the defendant's answer to the replication being called a *rejoinder*, and the subsequent pleadings being respectively termed *surrejoinder*, *rebutter*, and *surrebutter*.

Replevin.—The titles of the pleadings in an action of replevin, which was an action for unlawfully taking goods out of the possession of their owner, and was chiefly used in cases of unlawful distress, differed from those of other actions (see REPLEVIN). Thus, if the defendant in an action of replevin confessed the taking of the goods, but justified it as a distress for rent, that defence, which would have been called a plea in bar in other actions, was termed in replevin an *avowry* where the

defendant set up title in himself, and a *cognizance* where he alleged the title to be in another by whose orders he distrained; and the plaintiff's reply was called a plea in bar, and the defendant's rejoinder a replication, and so on, the title of each succeeding pleading being altered accordingly.

Ejectment.—The pleadings in an action of ejectment, which was a kind of mixed action, being partly a personal and partly a real action, were abolished by the Common Law Procedure Act, 1852, and other proceedings directed to be taken in lieu thereof (15 & 16 Vict. c. 76, s. 178). As to the nature of these pleadings, which were of a very quaint character, see Cole on *Ejectment*; the First Report of the Common Law Commissioners, 1851, p. 54; and FICTIONS, LEGAL; RECOVERY OF LAND.

It only remains to be mentioned that in pleading under the old system in the Courts of common law it was necessary to state, concisely and with certainty, what constituted the cause of action or ground of defence. The facts had to be stated logically in their natural order, and in a clear and distinct manner. Mere matters of evidence could not be stated. Nor could arguments on matters of law, or mere inferences of law, though statements of mixed law and fact, such as Not Guilty, were permitted.

See further, Bullen and Leake's *Precedents of Pleadings*, 3rd ed.; Chitty on *Pleading*, 7th ed.; Stephen on *Pleading*, 7th ed.

(b) *Chancery*.—A suit on the equity side of the Court of Chancery on behalf of a subject was ordinarily commenced by a petition, which in old times was called an English *Bill*, to distinguish it from proceedings in suits within the ordinary or common-law jurisdiction of the Court (as to which, see 12 & 13 Vict. c. 109). The bill was addressed to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal. If the suit was instituted on behalf of the Crown, or of persons claiming its particular protection, as, for instance, the objects of a public charity, the procedure was by *information* by the proper officer.

Bills by which proceedings were instituted were termed original bills; bills for supplying defects in original bills were termed bills in the nature of original bills. Original bills were divided into those praying relief and those not praying relief. The first class was again subdivided into (1) bills claiming relief against the opposite party, (2) bills of interpleader, and (3) *certiorari* bills. The second class consisted of (1) bills to perpetuate testimony, and (2) bills of discovery.

An original bill was in the nature of a declaration at common law, and was framed in the style of a petition. It contained a statement of the rights of the plaintiff, by whom and how he had been injured, or what assistance of the Court he desired, and a concise narrative of the material facts, matters, and circumstances on which he relied; and it prayed specifically for the relief which he conceived himself entitled to, and also for general relief (for the matter of the bill, see Daniell, *Chancery Practice*, 5th ed., pp. 266 *et seq.*). Until the Chancery Amendment Act, 1852, an original bill was said to consist of nine parts (see Mitford, *Pleadings*, 5th ed., pp. 49 *et seq.*), but afterwards of four parts only, viz.—(1) The address to the person or persons holding the Great Seal; (2) the name and address of the person complainant; (3) the statement of the plaintiff's case, commonly called the *stating part*; and (4) the prayer for relief.

In certain cases (*e.g.* in suits to obtain the benefit of a lost instrument, or for discovery of documents and relief thereon) it was necessary that the bill should be accompanied by an affidavit, in default of which it was liable to demurrer.

The bill was signed by counsel, and printed—except in certain urgent cases where a written bill was allowed on an undertaking to file a printed bill within fourteen days—and was filed at the Record and Writ Clerks' Office, and was then of record and of effect in Court (Cons. Order 8, r. 3). An information was signed by the Attorney-General.

Formerly, when the bill was filed, the plaintiff sued out and served the defendant with a writ of *subpoena*, but under the above-mentioned Act he served the defendant with a printed copy of the bill, indorsed with a direction to enter an *appearance* within eight days. Before the Act the bill contained an interrogating part, but afterwards *interrogatories* no longer formed part of the bill, but might be filed separately, within eight days from the time limited for appearance. The interrogating part was usually an exact echo of the stating part of the bill, but the separate interrogatories, if pertinent to the case, need not have been founded on an allegation in the bill.

After appearance, the defendant, if not interrogated, was not bound to answer, but might put in what was called a *voluntary answer*. If he considered that the plaintiff was not entitled to the relief claimed, he could state his objection, if appearing upon the face of the bill, by *demurrer*, or otherwise by *plea*; or, if relinquishing all claim to the property in question in the suit, he could put in an answer called a *disclaimer* (for provisions for entry of appearance for the defendant in case of his default, see 15 & 16 Vict. c. 86, s. 4; Cons. Order 10, rr. 3, 4, 6).

A demurrer in equity was much the same as in law (see DEMURRER). If it was allowed, the bill was dismissed; if overruled, the defendant was ordered to answer. A plea might be either to the jurisdiction; or to the person, showing some disability in the plaintiff; or in bar. A defendant might plead as to part of a bill, demur as to part, answer as to part, and disclaim as to the residue, so as these defences clearly referred to distinct parts of the bill. By demurrer the plaintiff demanded the judgment of the Court, whether he should be compelled to answer the bill or not; and by plea he showed cause why the suit should be dismissed, delayed, or barred (Mitford, *Pleadings*, 5th ed., p. 127; as to pleas, see Beames, *Pleas in Equity*).

The usual defence to a bill was by *answer*, which was the defendant's statement as to the facts stated in the bill or comprised in the interrogatories; and by means of it the plaintiff obtained *discovery*. Before the parties to an action in a Court of common law could be compelled to give evidence, discovery was peculiar to a Court of equity; but the common-law procedure was altered by legislation in 1851 and subsequent years. The answer was given upon oath, and was printed, and signed by counsel. It must have been direct and without evasion, and must have either denied or confessed all the material parts of the bill.

In certain cases the defendant was entitled, after answer, to file interrogatories for the examination of the plaintiff, prefixing a *concise statement* of the subject on which discovery was sought; but where he had any relief to pray against the plaintiff, he could do so by filing a *cross bill* (see 15 & 16 Vict. c. 86, s. 19).

The plaintiff might file *exceptions* to the answer, if he considered it insufficient, the allowance of which obliged the defendant to put in a more sufficient answer. If the plaintiff were content to take the answer as true, he could proceed to a hearing upon bill and answer only; otherwise, he put in a *replication* joining issue. So if the plaintiff had not required an answer, and the defendant had not answered, pleaded, or demurred (in which case he was considered to have traversed the bill), the plaintiff could file a replication to the same effect (see Cons. Order 17). *Special replication* and consequent *rejoinder*, *surrejoinder*, and *rebutter*, were abolished owing to the inconvenience, delay, and length of pleadings which they caused; and in 1845 the *subpœna to rejoin*, formerly required for joinder of issue, was also abolished.

If a defendant, required to answer, neither answered, pleaded, nor demurred, he was in contempt, and the plaintiff was entitled either to proceed as if the defendant had traversed the bill, in which case he filed a *traversing note* (see Cons. Order 13), or, upon execution of an attachment against the defendant, to obtain an order that the bill be taken *pro confesso* (Cons. Order 22).

As to the amendment of the pleadings, it was provided by the Act above mentioned (see s. 53), that it should not be necessary to file a *supplemental bill* for the purpose only of stating or putting in issue facts or circumstances occurring after the institution of the suit; but this might be done by way of amendment, before decree. After decree, a supplemental bill was necessary. Where a suit was not in such a state as to allow of amendment, the plaintiff might file a *supplemental statement*, but as, before decree, the bill might in almost all cases be amended, this course was rarely followed (see Daniell, vol. ii. p. 1395). Corrections could be made in an answer before it was filed, but after filing the defendant must have applied for leave to file a *supplemental answer*.

It may be added that under 15 & 16 Vict. c. 86 an order for administration could be obtained on *administration summons* without formal pleading, and under 13 & 14 Vict. c. 35 a judicial decision on a point of law where the facts were admitted could be obtained by way of *special case*, without pleadings.

[*Authorities*.—Daniell, *Chancery Practice*, 5th ed.; Mitford (Lord Redesdale), *Pleadings*, 5th ed.; Stephens, *Commentaries*, 6th ed.]

I. CHANGES INTRODUCED BY THE JUDICATURE ACT.

The principles on which pleadings were framed in the days of the Plantagenets, and the rules which regulated them then, continued substantially the same into the last century (see *ante*, p. 154). Their practical utility was, however, seriously impaired by the over-subtlety of the pleaders and by the excessive rigour with which the rules were applied; the merits of the case being entirely subordinated to technical questions of form. A determined effort was made to correct these defects by passing the Common Law Procedure Acts, 1852-1860. In 1873, however, it was found necessary to adopt a more thorough reform; and the Judicature Act introduced into the new High Court of Justice the system of pleading which, with some slight modifications, is still in force.

The most material changes made by this Act in the rules relating to pleading were the following:—

(i.) Forms of action were abolished. A plaintiff need no longer specify the particular form of action in which he seeks to recover judgment. He is now allowed to state the facts on which he relies, and the Court will grant him the remedy to which on those facts he is entitled. See *ACTIONS*, Vol. I. p. 151.

(ii.) Each party must now state facts and not conclusions of law. He was bound, before 1875, to set out with reasonable precision the points which he intended to raise; but this he generally did by stating, not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. His opponent thus learnt that he desired to prove some set of facts which would sustain a given legal conclusion; but how he proposed to sustain that legal conclusion was not disclosed. For instance, there was a very common form of declaration: "For money received by the defendant to the use of the plaintiff." A claim in that form might be established by some six or seven entirely different sets of facts, and it could not be ascertained from the plaintiff's pleading which set of facts would be set up at the trial, to show that the particular money claimed was received to the use of the plaintiff. Now the plaintiff must plead the facts on which he proposes to rely as showing that the sum of money which he claims was received by the defendant to his use.

(iii.) So, too, with the Defence. "The general issue" is abolished. In an action for goods sold and delivered, the defendant was formerly allowed to plead that he "never was indebted as alleged." This is a conclusion of law, and at the trial it was open to him to give in evidence under this plea any one or more of several totally different defences, *e.g.* that he never ordered the goods; that they never were delivered to him; that they were not of the quality ordered; that they were sold on a credit which had not expired at the time that the action was commenced; or that the Statute of Frauds had not been complied with. Now a mere denial of the debt is inadmissible (Order 21, r. 1). So in an action for money received to the use of the plaintiff, the defendant must either deny the receipt of the money, or the existence of those facts which are alleged to make such receipt a receipt to the use of the plaintiff (*ibid.*, r. 3).

So in actions of tort, the defendant was formerly allowed to plead "the general issue" Not Guilty. Under that plea it was open to him at the trial to raise several distinct defences. Thus the defendant in an action of libel or slander by one short and convenient plea of "Not Guilty," simultaneously denied the publication of the words complained of, denied that he published them in the defamatory sense imputed by the innuendo, or in any defamatory or actionable sense which the words themselves imported, asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendious mode of pleading is abolished. "Not Guilty" can no longer be pleaded in a civil action. The defendant must deal specifically with every allegation of which he does not admit the truth (Order 19, r. 17).

(iv.) Demurrers were abolished. It is true that either party is still allowed to place on the record an *objection in point of law*, which is very similar to the former demurrer. But there is this important difference. The party demurring could formerly insist on having his demurrer separately argued, which caused delay. But now such points of law are

argued at the trial of the action; it is only by consent of the parties, or by order of the Court or a judge, that the party objecting can have the point set down for argument and disposed of before the trial (Order 25, r. 2). And, as a rule, such an order will only be made where the decision of the point of law will practically render any trial of the action unnecessary.

(v.) Pleas in abatement were abolished. If either party desires to add or strike out a party, he must apply by summons (see *Kendall v. Hamilton*, 1879, 4 App. Cas. 504; *Pilley v. Robinson*, 1887, 20 Q. B. D. 155; *Wilson v. Balcarres Brook Steamship Co.*, [1893] 1 Q. B. 422; and PARTIES). No cause or matter now "shall be defeated by reason of the mis-joinder or non-joinder of parties" (Order 16, r. 11).

(vi.) Equitable relief is now granted, and equitable claims and defences are now recognised, in all actions in the High Court of Justice.

(vii.) Payment into Court was for the first time allowed generally in all actions.

(viii.) The right of set-off was preserved unchanged; but a very large power was given to a defendant to counterclaim. He can raise any kind of cross-claim against the plaintiff, and in some cases even against the plaintiff with others, subject only to the power of a Master or judge to order the claim and cross-claim to be tried separately, if they cannot conveniently be tried together.

(ix.) The defendant is also allowed in certain cases to bring in third parties and claim contribution or indemnity against them in the original action in which he himself is sought to be made liable. See PARTIES.

(x.) The names of the principal pleadings were changed. A Statement of Claim takes the place of the former *declaration*. Instead of *pleas*, the defendant now delivers a Defence, or, it may be, a Defence and Counterclaim. The *replication* is now called a Reply. The further pleadings, which now are rarely seen, retain their ancient names: *rejoinder*, *surrejoinder*, *rebutter*, and *surrebutter*.

II. OUR PRESENT PLEADINGS.

Leave to Plead.—Another important change was made in 1893. The parties were no longer permitted to deliver pleadings at their own pleasure. As a general rule, now, no pleading can be delivered between the parties except by leave of a Master, which must be obtained on a summons—usually on a summons for directions.

To this general rule, however, there are a few exceptions. A plaintiff, who has specially indorsed his writ under Order 3, r. 6, delivers a Statement of Claim without leave when he serves his writ. And the defendant may plead to such a special indorsement without leave unless and until the plaintiff takes out either a summons for summary judgment under Order 14, or a summons for directions under Order 30. Moreover (except in commercial causes) Order 30 only applies to proceedings after appearance. Hence, whenever it is necessary for a plaintiff to deliver a Statement of Claim under Order 13, r. 12, although the defendant has not appeared, he can do so without leave; and the defendant can subsequently appear and deliver a Defence thereto without leave. Other instances, in which a pleading can be delivered without leave will be found under Order 21, r. 14, and Order 24, r. 2; but these rarely occur.

But whenever the writ is generally indorsed, and the defendant has appeared, the plaintiff cannot, except in an Admiralty action, deliver a Statement of Claim without the leave of a Master, which he must obtain on a summons for directions. Leave will generally be given at the same time to the defendant to put in his Defence, which, besides answering the plaintiff's claim, may also set up a counterclaim. If a counterclaim be threatened, or if for any other reason it seems probable that a Reply will be necessary, leave to deliver that pleading also will be given by the Master on the first hearing of the summons for directions.

Time.—The time within which each successive pleading is to be delivered is also fixed as a rule by the Master when he gives leave for it to be pleaded. If no time be thus fixed, the pleadings must be delivered within the times prescribed by the Rules of Court, viz., a Statement of Claim within twenty-one days after appearance (Order 20, r. 1 (c)); a Defence within ten days after the delivery of the Statement of Claim (Order 21, r. 8); a Reply within ten days after the delivery of the Defence, whether it contains a Defence to a counterclaim or not (Order 23, r. 2); and any pleading subsequent to Reply within four days after the delivery of the previous pleading (Order 23, r. 3). Such times may, however, be enlarged by a Master under Order 64, r. 7, or by consent of the parties without application to a Master under rule 8 of the same Order. There is, as a rule, no difficulty in obtaining one or two extensions for a week or so, unless the case is to be tried at the assizes, and the commission day is drawing near when the plaintiff will rightly insist upon the defendant consenting to accept short notice of trial, if he require further time to plead.

Function of Pleadings.—The function of pleadings is still to ascertain with precision the matters on which the parties differ and the points on which they agree. Each party must give his opponent a sufficient outline of his case, though he need not disclose the evidence by means of which he hopes to establish it. Each party must state the material facts on which he will rely at the trial; each party in turn must either admit or deny every material fact alleged in the preceding pleading. Both parties thus learn before the case comes into Court what are the real points to be discussed and decided; the matters admitted are extracted and distinguished from those really in controversy; and the litigation is narrowed down to one or two definite issues.

Matters of Form.—Although pleadings are now delivered by order of a Master, they are not filed in Court, except in cases falling within Order 13, r. 12, *supra*; they are not deposited in Court until the case is entered for trial. They are not read or seen by the Master unless the opposite party raises some question as to them which he wishes the Master to decide. The pleadings are merely interchanged between the parties; the solicitor of each party in turn delivers his pleading to the solicitor of the other party, or to the party himself, if he does not employ a solicitor. This goes on till the pleadings are "closed." The cause is then entered for trial, for which purpose two copies of the complete pleadings are lodged with the officer of the Court (Order 36, r. 30; and the copy which is marked with the stamp denoting the fee paid on entry is regarded as the *record*).

Every pleading should be marked on its face with the date of the day on which it is delivered, with the letter and number of the writ, the title of the action, and the description of the pleading; a Statement

of Claim should also state the date of the writ. It must be indorsed with the name and place of business of the solicitor and agent (if any) who delivers it, or the name and address of the party delivering it, if he does not act by a solicitor (Order 19, r. 11). If it contains less than ten folios it may be either printed or written, or partly printed and partly written; if it contains ten folios or more, it must be printed. A folio contains seventy-two words or figures, every figure being counted as one word. Every pleading must be divided into paragraphs numbered consecutively. Dates, sums, and numbers should be expressed in figures, and not in words. It is not necessary, though it is generally desirable, that a pleading should be drawn or settled by counsel; where it has been, he must sign his name at the end of it; if not settled by counsel, it must be signed by the solicitor or by the party if he sues or defends in person.

The language of modern pleadings is no longer formal—sometimes, indeed, it is perhaps too informal. They are couched in ordinary simple English; there is a total absence of antiquated phraseology; technical terms are as a rule avoided. Under the Judicature Act all technical objections to pleadings are discouraged. Non-compliance with the rules of practice does not of itself render any proceeding void; and no application to set aside any proceeding for irregularity will be allowed, unless it is made within reasonable time, nor after the party applying has taken any fresh step in the action after knowledge of the irregularity (Order 70, rr. 1, 2; as to the meaning of the phrase, “step in the action,” see *JOINDER OF CAUSES OF ACTION*, Vol. VII., at p. 107). In particular, no technical objection can now be raised to any pleading on the ground of any alleged want of form (Order 19, r. 26). Still, “the Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action” (Order 19, r. 27).

III. FUNDAMENTAL RULE OF MODERN PLEADING.

The fundamental rule of our present system of pleading is this: “Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved” (Order 19, r. 4). This rule involves and requires four separate things:—

(i.) Every pleading must state material facts and material facts only.

(ii.) It must state facts, and not law.

(iii.) It must state facts, and not the evidence by which they are to be proved.

(iv.) It must state such facts in a summary form.

(i.) *Every Pleading must state Material Facts only.*—Every fact is material which is essential to the plaintiff’s cause of action or to the defendant’s defence—which each in turn must prove or fail. Every statement which need not be proved is immaterial and should be omitted. The question whether a particular fact is or is not material, depends mainly on the special circumstances of the particular case. Sometimes it is material to allege and prove that the defendant had notice of a certain fact; at other times it is sufficient to aver that he did some act, without

inquiring into the state of his mind at the time. In some cases the defendant's intention is material; in a few cases his motive. Sometimes it is necessary to give details as to time, place, or pedigree. Matters which merely affect the *amount* of damages recoverable need not, as a rule, be pleaded; though it is often convenient to see them on the record. But each party must always state his whole case. He must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. The Statement of Claim must disclose a good cause of action; the Defence must show a good answer to the Statement of Claim. No averment must be omitted which is essential to success. "Upon all sound principles of pleading it is necessary to allege what must, and not what may, be a cause of action" (*per cur.* in *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B., at p. 399). If a plaintiff's cause of action, or his title to sue, depends on a statute, he must plead all facts necessary to bring him within that statute (*Seear v. Lawson*, 1880, 16 Ch. D. 121; *Davis v. James*, 1884, 26 Ch. D. 778; *Read v. Brown*, 1888, 22 Q. B. D. 128; *Bradley v. Chamberlyn*, [1893] 1 Q. B. pp. 441, 442).

But the pleader need only allege facts which are material at the present stage of the action. It is sufficient that each pleading in turn should contain in itself a good *prima facie* case, without reference to possible objections not yet urged. "It is no part of the Statement of Claim to anticipate the Defence, and to state what the plaintiff would have to say in answer to it" (*per James, L.J.*, in *Hall v. Eve*, 1876, 4 Ch. D., at p. 345). Thus to anticipate the answer of the adversary is, according to Hale, C.J., "like leaping before one come to the stile" (*Sir Ralph Bovey's Case*, 1673, Vent. 217).

(ii.) *Every Pleading must state Facts, and not Law.*—Conclusions of law, or of mixed law and fact, may no longer be pleaded. It is for the Court hereafter to declare the law arising upon the facts proved before it. A plaintiff must not aver, "I am entitled to certain property," or "It was the defendant's duty to do so and so." He must state the facts which in his opinion give him that title, or impose on the defendant that liability or that duty. So, too, a defendant must not say merely, "I do not owe the money;" he must allege facts which will show that he does not owe it (Order 21, rr. 1, 2, 3). And whenever the same legal result can be attained in several different ways, it is not sufficient to aver merely that the result has been arrived at; the facts must be stated showing how and by what means it was attained. Thus it is not sufficient for the plaintiff to plead that the defendant's bill of sale is void and of no effect in law; facts must be stated showing why it is void, *e.g.* that it has not been registered, or is not in the form given in the schedule to the Bills of Sale Act. So if either party asserts that he has a right of way, he must state in his pleading whether he claims it by prescription or grant (*Harris v. Jenkins*, 1882, 22 Ch. D. 481; *Spedding v. Fitzpatrick*, 1888, 38 Ch. D. 410; *Pledge v. Pomfret*, 1905, 74 L. J. Ch. 357; 92 L. T. 560); but he is not bound to name the parties or give the precise dates of lost grants (*Palmer v. Guadagni*, [1906] 2 Ch. 494).

(iii.) *Every Pleading must state Facts, and not Evidence.*—Facts should be alleged as facts, without the evidence by which they are to be proved. It is not necessary to state in the pleadings circumstances which merely tend to establish the facts at issue. The fact in issue between the parties is the fact to be proved, and therefore the fact to be alleged. It is unnecessary to tell the other side how it is proposed to prove that fact;

such matters will be *relevant* at the trial, but they are not *material facts* for pleading purposes.

Thus it is wrong to set out in a pleading admissions by the opponent (*Davy v. Garrett*, 1878, 7 Ch. D. 473; *Lumb v. Beaumont*, 1884, 49 L. T. 772). Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it is sufficient to allege the same as a fact without setting out the circumstances from which it is to be inferred (Order 19, r. 22). Wherever it is material to allege notice of any fact, it is sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material (Order 19, r. 23). Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it is sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail (Order 19, r. 24). In every case in which the cause of action is a stated or settled account, the account should be alleged with particulars; but in every case in which a statement of accounts is relied on only by way of evidence or admission of another cause of action which is pleaded, the account should not be alleged in the pleadings (Order 20, r. 8).

(iv.) *Every Pleading must state Material Facts in a Summary Form.*—Material facts must be stated clearly and definitely, and yet briefly. The pleading should be as concise as is consistent with precision and clearness. Material dates and names should be stated; else the opponent will apply for particulars (see PARTICULARS). Facts should be alleged as facts, in clear and positive terms, in short terse sentences, and in strict chronological order. Pleadings are to be “as brief as the nature of the case will admit” (Order 19, r. 2). Prolixity involves costs (*ibid.*, r. 5).

This necessary brevity can be attained in two ways:—

(a) By omitting everything that is immaterial or unnecessary. It is bad pleading to insert a single unnecessary allegation. Thus neither party should quote public Acts of Parliament, or state in his pleading the propositions of law which he proposes to urge upon the Court. Neither party need, in any pleading, allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side (Order 19, r. 25). Or the performance of any condition precedent; as such an averment is now implied in every pleading (Order 19, r. 14). Neither party need set out the whole or any part of any document, unless its precise words are material; it is sufficient to state briefly its effect (Order 19, r. 21; *Darbyshire v. Leigh*, [1896] 1 Q. B. 554; but see *Harris v. Warre*, 1879, 4 C. P. D. 125). It is not necessary for any defendant to plead any denial or defence as to damages claimed or their amount; they shall be deemed to be put in issue in all cases, unless expressly admitted (Order 21, r. 4). It is unnecessary for either party to plead to his opponent's prayer or claim, or to his particulars, or to any matter introduced by a *videlicet*. He need only deal with the allegations contained in the body of the preceding pleading. It is unnecessary for either party in his pleading to refer to any item for which his opponent has given him credit, or to any interlocutory proceeding in the action, or to recount the history of the case since writ, or to plead any matter, or to plead to any matter, which merely affects costs. Neither party should plead to any matter of law set

out in his opponent's pleading. This may be treated as mere surplusage (*Richardson v. Mayor of Orford*, 1793, 2 Black. (H.) 182). Neither party may plead to any matter of fact which is not alleged against him (*Rassam v. Budge*, [1893] 1 Q. B. 571). Lastly, as we have seen, it is not necessary for either party to plead any fact which is not yet material to his case; though he may reasonably suppose that it may become material at a later stage.

(b) And even when only material facts are pleaded, it is still necessary to secure brevity by omitting all unnecessary details in the statement of those material facts. A certain amount of detail is essential to ensure clearness and precision. "Although pleadings must now be concise, they must also be precise" (*per* Kay, J., in *Townsend v. Parton*, 1882, 30 W. R. 287; 45 L. T. 756). Indeed, Order 19, r. 6, expressly requires that, whenever particulars are necessary, they must be stated, with dates and items, in the body of the pleading, unless they are particulars of debt, expenses, or damages, and exceed three folios (216 words or figures), when they must be drawn up separately. But this rule does not state when such particulars are necessary, or what degree of particularity is expected of the pleader. Under the old system of pleading there was much learning on the subject of "Certainty," as it was called. But this is necessarily qualified to some extent by the important alterations made by the Judicature Act. No general rule can be laid down which will be more precise than this, stated by Lord Justice Bowen in *Ratcliffe v. Evans*, [1892] 2 Q. B., at pp. 532, 533: "As much certainty and particularity must be insisted on, both in pleading and proof, as is reasonable, having regard to the circumstances and to the nature of the acts themselves. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

IV. STATEMENT OF CLAIM.

Parties.—Before drafting a Statement of Claim, counsel must carefully consider whether all necessary parties have been brought before the Court, and also whether any have been improperly joined. He has to show in his pleading a right of action in every plaintiff, and a liability on the part of each defendant, jointly, severally, or in the alternative. If the plaintiff desires to add a fresh plaintiff or defendant, an application must be made under Order 16, rr. 11 and 12. But he is not bound to continue the action against all the defendants named on the writ; he can serve any of them, if he wishes, with a notice of discontinuance under Order 26, r. 1 (see DISCONTINUANCE, Vol. IV. p. 600). As to what parties are necessary, and what are optional, see PARTIES.

Joinder of Causes of Action.—The plaintiff may, speaking generally, unite in one action any number of causes of action against the same defendant or defendants (see JOINDER OF CAUSES OF ACTION), so long as they all existed at the date of the writ, and are referred to in the indorsement thereon. But strictly he may not, without express leave, include in his Statement of Claim a new and independent cause of action which is not mentioned on his writ (*Cave v. Crew*, 1893, 62 L. J. Ch. 530; *United Telephone Co. v. Tasker*, 1888, 59 L. T. 852); although he may by his Statement of Claim, and without any amendment of the indorsement on the writ, alter, modify, or extend any claim, which is included therein (Order 20, r. 4). On the other hand, if a plaintiff in his Statement

of Claim omits all mention of a cause of action or a claim for relief which is stated on his writ he will be deemed to have elected to abandon it (*Cargill v. Bower*, 1878, 10 Ch. D., at p. 508; and see *Wilmott v. Freehold Property Co.*, 1884, 51 L. T. 552). If more than one cause of action be disclosed on his writ, he must in his pleading, so far as is possible, state separately and distinctly the facts upon which each claim is founded (Order 20, r. 7).

Drafting a Statement of Claim.—A Statement of Claim should state the material facts on which the plaintiff relies, and then claim the relief he desires. It may be necessary to begin with certain introductory averments—*matters of inducement*, as they were called—stating who the parties are, what trade they carry on, how they are connected, and any other circumstances leading up to the dispute, and explaining what is to follow. Next, in any action founded on contract, the contract should be alleged, and then its breach. It should clearly appear on the pleading whether the contract sued on is express or implied; if express, its date should be stated, and whether it was written or verbal; if implied, the facts should be set out from which the plaintiff contends a contract should be implied. If the contract be by deed, this fact should be stated; in other cases a consideration must be shown. If, however, the action be one of tort, the right which has been violated (unless it be one which every citizen possesses) must be alleged, and then its violation. It is not sufficient to allege that a right, or a duty, or a liability existed; the facts must be stated which gave rise to such right or created such duty or liability. Then should follow in either case the allegations as to damage. All special damage must be claimed in full detail; otherwise no evidence of it will be allowed (*Lipman v. Pulman*, 1904, 91 L. T. 132). Matter in aggravation of damages may be set out in the Statement of Claim, if the plaintiff desires (*Millington v. Loring*, 1880, 6 Q. B. D. 190). The plaintiff can claim for any damage that has accrued to him since writ from a cause of action vested in him before writ (Order 36, r. 58), except where such damage is an essential part of the cause of action, as to which, see DAMAGES, Vol. IV., at pp. 328, 329. But he cannot claim damages in respect of any cause of action which has only accrued to him since writ. For such damages he must issue a second writ; and he can then apply, if he thinks fit, to have the two actions consolidated (*Martin v. Martin*, [1897] 1 Q. B. 429). Last should come the claim for relief—be it damages, or an injunction, a declaration, a mandamus, or a receiver.

V. DEFENCE.

So far we have dealt only with the statement by a party of his own case. But in every pleading after the first, each party must do more than state his own case; he must deal with that presented by his opponent.

1. *Attacking the Statement of Claim.*—The first question is, "Has the plaintiff properly presented his case?" or sometimes, "Has the plaintiff presented any case?" If the plaintiff has shown no cause of action at all, the defendant may apply under Order 25, r. 4, to dismiss the action as being frivolous and vexatious, though such an order is only made in a clear case. (And see the Vexatious Actions Act, 1896, 59 & 60 Vict. c. 51.) Such an application should be made, if at all, before any Defence is delivered. Then, is the claim properly pleaded? If not, it may be necessary to take out a summons to have the State-

ment of Claim amended under Order 19, r. 27, as being embarrassing; or to apply for particulars (see PARTICULARS). Are all necessary parties before the Court, or have any been improperly joined? (see PARTIES). Have claims been joined which cannot conveniently be disposed of in one action? If so, the defendant should apply to have them severed under Order 18, rr. 1, 7, 8, or 9 (see JOINDER OF CAUSES OF ACTION). Should the action be remitted to the County Court, under either sec. 65 or sec. 66 of the County Courts Act, 1888, 51 & 52 Vict. c. 43? Or is it from its nature one that ought to be referred, and has the plaintiff ever agreed in writing to submit the dispute to arbitration? If so, the defendant must at once, before delivering any pleading or taking any other step in the action, except appearing, apply to a Master to stay the proceedings, under sec. 4 of the Arbitration Act, 1889, 52 & 53 Vict. c. 49.

2. *Answering the Statement of Claim.*—There are three ways in which the defendant can deal with his opponent's pleading.

(a) He may take an *objection in point of law* that even if every word in the Statement of Claim were true it would disclose no cause of action.

(b) He may *traverse* some or all of the material allegations contained in it.

(c) He may admit them as being true so far as they go; but add other facts which put a different complexion on the case. This is the old *confession and avoidance*; see *ante*, p. 157.

He may adopt any one or more of these methods of pleading, so long as he makes it quite clear which he is adopting. He may take all three courses at once; the same allegation may be traversed in point of fact, and objected to as bad in law, and at the same time collateral matter may be pleaded to destroy its effect. Any number of defences may be pleaded together in the same action, although they may appear inconsistent. A defendant may "raise by his Defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in Order 19, r. 27," as to striking out embarrassing matter (*per* Thesiger, L.J., in *Berdan v. Greenwood*, 1878, 3 Ex. D. 255). And a Defence is not embarrassing merely because it contains inconsistent averments (*In re Morgan, Owen v. Morgan*, 1887, 35 Ch. D. 492).

(i.) *Objection in Point of Law.*—Such an objection can only be raised when the defect is apparent on the face of the Statement of Claim. The defendant cannot state new facts in his Defence or in an affidavit, and then contend that the result of the combination is to show that the plaintiff has no case. No one is bound to plead an objection in point of law (except in one case, viz., if he wishes to apply under the latter part of rule 2 of Order 25 to have the point of law set down for hearing and disposed of before the trial). The defendant will always be allowed to raise at the trial any point of law whether he has stated it in his Defence or not. Pleading an objection in point of law does not entitle the defendant (as a demurrer formerly did) to have the point of law argued before the hearing; it is only by consent of the parties, or by order of the Court or a judge, that the party objecting can have the point set down for argument and disposed of before the trial. As a rule, such an order will only be made where the decision of the point of law will practically render any trial of the action unnecessary. To obtain such an order the objection must

be expressly taken on the pleading, and it must be taken clearly and explicitly; any allegation which wears a doubtful aspect, and may be either a traverse or an objection, is embarrassing, and will be struck out (*Stokes v. Grant*, 1878, 4 C. P. D. 25).

(ii.) *Traverses*.—The office of a traverse is to contradict, not to excuse; the object of it is to compel the plaintiff to prove the truth of the allegation traversed. It does not dispute the sufficiency in law of the plaintiff's allegation: that must be done, if at all, by an objection. Nor may matter justifying an act be insinuated into a plea which denies the act. To plead "There never was any such agreement as alleged" is a totally different thing from saying, "There was an agreement; but I dispute its validity in point of law; wherefore I broke it." If the defendant wishes to contend that any contract on which the plaintiff relies is invalid, he must do something more than traverse the agreement: he must plead specially by way of confession and avoidance the matters of fact which render it invalid, *e.g.* that he was an infant, or had been induced to enter into it by fraud (Order 19, r. 20). All facts showing illegality or showing that the transaction is either void or voidable in point of law must be specially pleaded (*ibid.*, r. 15). A traverse merely denies the fact; it leaves unquestioned its sufficiency in law. Conversely, only allegations of fact should be denied; no matter of law should be traversed. Nor should the pleader ever traverse matter not alleged against him: he should be content to answer what is laid against him in the Statement of Claim, and not trouble about any other matter which the plaintiff might have, but has not raised (*Rassam v. Budge*, [1893] 2 Q. B. 524).

There are three leading rules which any party must bear in mind when traversing:—

(a) Every allegation of fact in any pleading, which is not denied specifically, or by necessary implication, or stated to be not admitted, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition (Order 19, r. 13; and see *Harris v. Gamble*, 1877, 6 Ch. D. 748).

As a rule, each party should admit whatever he knows to be true; and traverse only those allegations which he really means to dispute at the trial. It looks weak to deny everything; moreover, it increases the cost of the litigation.

(b) When a party denies any allegation of fact made by his opponent he must not do so evasively, but answer the point of substance (Order 19, r. 19). A traverse must be neither too large nor too narrow, nor too literal: it may become evasive if it follows too closely the precise language of the allegation traversed. Thus if an allegation be made with divers circumstances, it is not sufficient to deny it along with those circumstances (Order 19, r. 19). That is to say, if the plaintiff alleges that he paid the defendant £500 at 35 Fleet Street on March 3, 1908, it is an evasive traverse for the defendant to plead: "The plaintiff did not pay the defendant £500 at 35 Fleet Street on March 3, 1908." The full traverse would be: "The plaintiff never paid the defendant £500 or any other sum at 35 Fleet Street, or at all."

(c) It is not sufficient for a defendant in his Defence to deny generally the grounds alleged by the Statement of Claim, or for a plaintiff in his Reply to deny generally the grounds alleged in a Defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth (Order 19, r. 17). To this rule there are two exceptions:—

No denial or defence is necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted (Order 21, r. 4).

No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title unless his Defence depends on an equitable estate or right, or unless he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in those cases, it is sufficient for him to state by way of defence that he is so in possession. It shall be taken as implied in such statement that he denies, or does not admit, the allegations of fact contained in the Statement of Claim; and he may, also under that plea, rely upon any legal ground of defence which he can prove (Order 21, r. 21).

(iii.) *Confession and Avoidance*.—The pleader must not always confine himself to merely traversing. It is generally necessary for him at the trial to set up some affirmative case. If this is merely his version of the matters alleged in the Statement of Claim, he is not bound to state it in his pleading. Thus if the plaintiff says the defendant broke and entered his close and trampled down his wheat, the defendant need not state that it was Jones, a third person, who did this; he may content himself with denying he did it. But “the defendant must raise by his pleading all matters which show the action not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds” (Order 19, r. 15).

All facts which it is alleged excuse or justify the act of which the plaintiff complains must be specially pleaded. And they must be pleaded with especial particularity and care, if the defendant is thus imputing fraud or misconduct to the plaintiff or his agents. Thus in an action of wrongful dismissal, a plea justifying the dismissal on the ground that the servant was incompetent or dishonest must state the charge specifically and in detail; so must a plea justifying the publication of defamatory words on the ground that they are true; or a plea justifying an assault on the ground of self-defence. And in all these cases the plea must either justify or excuse the whole of the acts complained of, or else it must be expressly limited by some such prefix as “And in answer to paragraph 4 of the Statement of Claim,” or “As to so much of the claim as alleges that,” etc. So, too, all facts which show a subsequent discharge of a once subsisting cause of action must be specially pleaded; such, for instance, as that the defendant has paid the debt sued for in the action; or that it has been released.

Equitable defences may now of course be pleaded and equitable relief claimed in any action brought in the King's Bench Division (Judicature Act, 1873, s. 24, subs. 2).

Matter arising since Writ.—Any ground of defence which has arisen after action brought, but before the defendant has delivered his Defence, and before the time limited for his doing so has expired, may be raised by the defendant in his Defence, either alone or together with other grounds of defence (Order 24, r. 1). This was formerly called “a plea to the further maintenance of the action.”

Where any ground of defence arises after the defendant has delivered

a Defence, or after the time limited for his doing so has expired, the defendant may within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or a judge, deliver a further Defence setting forth the same (Order 24, r. 2). This was formerly called "a plea of *puis darrein continuance*."

Whenever a defendant alleges under either of these rules any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (see Form No. 5 of R. S. C., Appendix B), and may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge shall otherwise order (Order 24, r. 3).

Payment into Court.—Payment into Court is not strictly a defence; it is rather an attempt at a compromise. No such plea was known to the common law; it is entirely the creature of statute. The Judicature Act, 1873, for the first time permitted payment into Court generally in all actions. In all actions except libel and slander, a defendant is now allowed to deny all liability, while, at the same time, he pays money into Court.

If the Statement of Claim contains more than one cause of action, the Defence must specify to which cause of action the money is paid in (Order 22, r. 2; *The James Tucker, etc., Co. v. Lamport & Holt*, 1906, 23 T. L. R. 10). But the mere omission to specify such cause of action will not render the payment into Court nugatory (*Benning v. Ilford Gas Co.*, [1907] 2 K. B. 290). Where there is only one cause of action, but it consists of many items, the defendant is, nevertheless, entitled to pay money into Court generally to that cause of action. He will not, as a rule, be ordered to deliver particulars, specifying how much he has paid in to each item, or even in respect of which items the payment is made (*Paraire v. Loibl*, 1880, 49 L. J. C. P. 481). But the Court has a discretion in the matter, and in special circumstances will order such particulars (*Boulton v. Houlder*, 1903, 19 T. L. R. 635; 9 Com. Cas. 75).

Unless, however, the defendant, on paying money into Court, expressly denies liability, such payment is considered to admit the plaintiff's claim (Order 22, r. 1) to the extent of the amount so paid in (*Hennell v. Davies*, [1893] 1 Q. B. 367; *Brown v. Feeney*, [1906] 1 K. B. 563); the plaintiff can have the money so paid in paid out to him at his request (r. 5); and the defendant cannot subsequently deliver any Defence denying liability (*Dumbelton v. Williams*, 1897, 76 L. T. 81). But if the defendant expressly denies liability when he pays the money into Court, then, unless the plaintiff accepts it in full satisfaction of his claim, and so puts an end to the action and has his costs taxed up to date, the money will remain in Court till the end of the trial. If the plaintiff does not accept the money paid into Court, whether paid in with or without a denial of liability, but goes on with the action, he does so at the risk of having to pay costs in case he recovers less than the amount paid in.

Hence, if the defendant pays money into Court at all, he should pay in a good round sum, more than he himself thinks the plaintiff is entitled to. The jury will find their verdict without reference to the amount paid in; indeed, neither the fact that money has been paid into Court nor the amount paid in, may now be mentioned to them (Order 22, r. 22). This rule is "most salutary and has worked well" (*per* Lopes, L.J., in *Williams v. Goose*, [1897] 1 Q. B., at p. 473).

In actions of libel and slander, however, a defendant is not allowed

to pay money into Court at all, if he at the same time deny liability. In those actions, the payment of money into Court admits liability to the extent of the sum paid in, and the plaintiff is entitled to have that sum paid out to him at once, although he does not accept it in satisfaction of his claim (Order 22, rr. 1, 5). If, however, the plaintiff leaves the money in Court, and the jury find a verdict for a less amount, the judge at the trial may order that the excess be repaid to the defendant (*Gray v. Bartholomew*, [1895] 1 Q. B. 209). Whether this is so when the payment into Court is accompanied by a plea under Lord Campbell's Act is a doubtful point. The portion of sec. 2 of that Act which enabled a defendant to pay money into Court was repealed in 1879 by the 42 & 43 Vict. c. 59; hence it would seem that now money can only be paid into Court under Order 22 of the Rules of the Supreme Court. But see *Oxley v. Wilkes*, [1898] 2 Q. B. 56; *Sley v. Tillotson*, 1898, 62 J. P. 505; *Veale v. Reid*, 1904, 117 L. T. Jo. 292; *Brown v. Feeney*, [1906] 1 K. B. 563; *Maxwell v. Viscount Wolseley*, [1907] 1 K. B. 274; and Odgers on *Libel and Slander*, 4th ed., p. 596.

Where, however, the words are defamatory in their natural and obvious meaning, and the plaintiff by his innuendo puts on them a more defamatory meaning, the defendant may traverse the innuendo and at the same time pay money into Court, provided he makes it clear that he admits liability in respect of the words without the alleged meaning (*Mackay v. Manchester Press Co.*, 1889, 54 J. P. 22; 6 T. L. R. 16).

Default of Defence.—If the time for pleading expires, and no Defence has been delivered, the plaintiff may enter judgment by default. But if he delays doing this, the defendant may put in a Defence after time, which will prevent judgment being subsequently entered; though the defendant will probably be ordered to pay any costs incurred through his delay (Order 12, r. 22; *Graves v. Terry*, 1882, 9 Q. B. D. 170; *Gill v. Woodfin*, 1884, 25 Ch. D. 707). An extension of the time for pleading may be granted even after the time allowed for pleading has expired (Order 64, r. 7). See DEFAULT, Vol. IV. p. 478.

VI. SET-OFF AND COUNTERCLAIM.

Set-Off.—At common law a defendant who had any cross-claim against the plaintiff could not raise it in the plaintiff's action: he had to bring a cross-action. He might, it was true, when sued for the price of goods, give evidence of a breach of any warranty, expressed or implied, in reduction of the price (see *Street v. Blay*, 1831, 2 Barn. & Adol. 456, and DAMAGES: *Matters in Mitigation of Damages*, Vol. IV. p. 333). But that was all. Then by a statute of George II. (2 Geo. II. c. 22) he was allowed to plead a set-off in certain cases. A set-off was (and is) a liquidated cross-claim, and it could be pleaded only to a liquidated claim. It must always be specially pleaded. Both the set-off and the claim to which it was pleaded had to be mutual debts, both due between the same parties in the same right. A claim by a man personally could not be set off against a claim made against him in his representative capacity (*Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314; *Nelson v. Roberts*, 1893, 69 L. T. 352; *In re Pollitt, Ex parte Minor*, [1893] 1 Q. B. 455; *David v. Rees*, [1904] 2 K. B. 435). A claim against the estate of a man deceased could not be set off against a debt due to him in his lifetime (*Rees v. Watts*, 1855, 11 Ex. Rep. 410). But a debt due from an agent can be set off against his principal whenever the principal has

allowed the agent to act as principal in the transaction (*George v. Clagett*, 1797, 7 T. R. 359; 2 Sm. L. C., 9th ed., 130; *Montagu & Co. v. Forwood Brothers & Co.*, 1893, 42 W. R. 124). So a debt due from a *cestui que trust* can be set off against a claim made by a trustee on behalf of that *cestui que trust* (*Agra & Masterman's Bank v. Leighton*, 1866, L. R. 2 Ex. 56; *Bankes v. Jarvis*, [1903] 1 K. B. 549). Again, both debts had to be legal debts, and for a liquidated amount (*Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93). If either debt sounded in damages, or was in the nature of a penalty, or was of an equitable character, there was no set-off. A debt accruing due after the commencement of the action is not within the Statute of George II., and cannot be pleaded as a set-off, even to the further maintenance of the action (*Richards v. James*, 1848, 2 Ex. Rep. 471; 17 L. J. Ex. 277). A debt which is barred by the Statute of Limitations, or is for any other reason irrecoverable by action cannot be a good set-off (*Walker v. Clements*, 1850, 15 Q. B. 1046; *Smith v. Betty*, [1903] 2 K. B. 317). And if the debt due from the plaintiff to the defendant exceeded the amount due from the defendant to the plaintiff, the defendant could not, before 1875, recover the difference in the plaintiff's action; he could only set off an amount equal to the plaintiff's claim, and had to bring a cross-action for the balance.

Counterclaim.—But now, under the Judicature Act, the defendant has a very large power of counterclaiming. He may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether it sound in damages or not. Such set-off or counterclaim will have the same effect as if it were a cross-action, and the Court will pronounce one final judgment in the action, both on the original and on the cross-claim. If the amount which is found due to the plaintiff on his claim exceeds the amount established by the defendant on his counterclaim, the plaintiff will have judgment for the difference; if, however, the balance is in favour of the defendant, judgment will be given for the defendant for such balance, or for such other relief as he may be entitled to upon the merits of the case (Order 21, r. 17). There is no need for the defendant to bring a cross-action, unless his counterclaim be of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the claim. If the plaintiff can show that the counterclaim is one which cannot be conveniently disposed of in the pending action, or ought not to be allowed, a Master will disallow the counterclaim, and leave the defendant to bring a cross-action (Order 19, r. 3; Order 21, r. 15).

A counterclaim may be for either liquidated or unliquidated damages (Order 19, r. 3); it may exceed in amount the plaintiff's claim (*Winterfield v. Bradnum*, 1878, 3 Q. B. D. 324); it may be equitable as well as legal (*Eyre v. Hughes*, 1876, 2 Ch. D. 148; *Fleming v. Loe*, [1901] 2 Ch. 594); a cause of action which has accrued to the defendant since the writ was issued can be pleaded as a counterclaim (*Beddall v. Maitland*, 1881, 17 Ch. D. 174). To a joint claim by two plaintiffs, a separate counterclaim against each of them will be allowed (*M. S. & L. Rly. Co. and L. & N.-W. Rly. Co. v. Brooks*, 1877, 2 Ex. D. 243). A joint claim against two partners may be set up as a counterclaim against a separate claim by one of them (*Eyre v. Moreing*, 1884, W. N. 58). Where a plaintiff brought an action against a married woman, and joined her husband as a co-defendant for conformity, a joint counterclaim by husband and wife was allowed (*Hodson v. Mochi*, 1878, 8 Ch. D. 569). But if a man sues in his own right, a counterclaim against him as a trustee or

executor will, as a rule, be struck out (*Macdonald v. Carington*, 1878, 4 C. P. D. 28). The provisions of Order 18 (see JOINDER OF CAUSES OF ACTION) apply to the joinder of various claims in a counterclaim (*Padwick v. Scott*, 1876, 2 Ch. D. 736; *Compton v. Preston*, 1882, 21 Ch. D. 138). But to a claim for the recovery of land, the defendant may counterclaim for relief against forfeiture (*Warden, etc. v. Sewell*, [1893] 2 Q. B. 254).

It is not necessary that the claim raised by the counterclaim should be analogous in its nature to that made by the plaintiff. Thus, a counterclaim in tort may be pleaded in an action for breach of contract, and *vice versa* (*Stooke v. Taylor*, 1880, 5 Q. B. D., at p. 576). Nor need its subject-matter be identical with, or even connected with, the subject-matter of the claim. The claim and counterclaim may arise out of entirely different transactions, so long as they can be conveniently tried together (*Atwood v. Miller*, 1876, W. N. 11; *Macdonald v. Bode*, 1876, W. N. 23; *Quin v. Hession*, 1878, 40 L. T. 70; 4 L. R. Ir. 35). Thus, in an action for damages for the infringement of a patent, the defendant may counterclaim for revocation of the patent (7 Edw. VII. c. 29, s. 32). "A defendant is entitled to set up any counterclaim that is not so incongruous as to be incapable of being tried with the original action" (*per* Archibald, J., in *Bartholomew v. Rawlings*, 1876, W. N. 56). Thus at the Cambridge Summer Assizes, 1880, Kelly, C.B., tried an action of slander in which there was a counterclaim as to a right of shooting over the land occupied by the defendant (*Dobede v. Fisher*, *Times* for July 29, 1880). But where the writ was specially indorsed for two quarters' rent, the defendant was not allowed to set up a counterclaim for libel and slander wholly unconnected with the claim for rent (*Rotherham v. Priest*, 1879, 40 L. J. C. P. 105; 41 L. T. 558). And where the defendant brings in a third party as defendant with the plaintiff to a counterclaim, the relief thus sought must relate specifically to, or be connected with, the subject-matter of the plaintiff's claim (*Padwick v. Scott*, 1876, 2 Ch. D. 736; *Barber v. Blauiberg*, 1882, 19 Ch. D. 473; *S. F. Edge, Ltd. v. Weigel*, 1907, 97 L. T. 447). A defendant cannot join a third person to be a joint plaintiff with himself in a counterclaim against the original plaintiff (*Pender v. Taddei*, [1898] 1 Q. B. 798).

A counterclaim is substantially a cross-action; not merely a defence to the plaintiff's action. It must be pleaded like a Statement of Claim. It may comprise several distinct causes of action (*Turner v. Hednesford Gas Co.*, 1878, 3 Ex. D. 145). The defendant must allege all material facts necessary to support his counterclaim, and what is more he must state specifically that they are pleaded by way of counterclaim (Order 21, r. 10). The plaintiff must plead to a counterclaim precisely as though he were a defendant answering a Statement of Claim. If after the defendant has pleaded a counterclaim, the action of the plaintiff is for any reason stayed, discontinued, or dismissed, the counterclaim may nevertheless be proceeded with (Order 21, r. 16). Thus where the plaintiff's claim was held to be frivolous, the Court still granted the defendant the relief prayed for by his counterclaim (*Adams v. Adams*, 1890, 45 Ch. D. 426; [1892] 1 Ch. 369). In short, as Lord Esher, M.R., says in *Stumore v. Campbell & Co.*, [1892] 1 Q. B., at pp. 316, 317: "No doubt matter is occasionally pleaded as counterclaim which is really set-off; but counterclaim is really in the nature of a cross-action. This Court has determined that in settling the rights of parties where there is a counterclaim, the claim and counterclaim are, for all purposes except

execution, two independent actions." But note that where the plaintiff for any reason fails to deliver a Defence to a counterclaim, the defendant cannot sign judgment on the counterclaim in default of pleading; he must move for judgment under Order 27, r. 11, or Order 32, r. 6 (*Higgins v. Scott*, 1888, 21 Q. B. D. 10; *Jones v. Macaulay*, [1891] 1 Q. B. 221; *Roberts v. Booth*, [1893] 1 Ch. 52). A counterclaim, moreover, cannot be disposed of under Order 14, or remitted to a County Court for trial (*Delobel-Flipo v. Varty*, [1893] 1 Q. B. 663).

Present Distinction between Set-off and Counterclaim.—The right of counterclaiming is thus much wider and more comprehensive than the former right of set-off. Every set-off could in fact be pleaded as a counterclaim. Yet it must not be assumed that the old law as to set-off has become obsolete. The distinction between a set-off and a counterclaim is still maintained. A set-off remains precisely what a set-off used to be under the Statute 2 Geo. II. c. 22; and every other kind of cross-claim is a counterclaim. It is perhaps unfortunate that the distinction should be preserved, but it was unavoidable. If a man die insolvent, his creditors only get a dividend on their claims, while the debtors to the estate must pay up their debts in full. If the same man be both a debtor and a creditor, he is naturally anxious to set one amount off against the other, and pay up or receive the balance only. And this he may do if he has a strict statutory right of set-off, but not otherwise. If he has only a counterclaim for the debt due to him from the estate, he must pay up his debt to the estate in full, and prove in the administration and obtain a dividend on his claim. In bankruptcy, however, or if a company is being wound up, a debtor to the estate or company may, it seems, set off a claim for unliquidated damages. But no set-off, whether liquidated or not, is allowed against a claim for calls in the winding-up of a company (see secs. 75 and 101 of the Companies Act, 1862, and sec. 6 of the Act of 1867; and COMPANY, Vol. III. p. 340).

Again, as a set-off is a defence proper to an action, a plaintiff who brings an action and is met by a set-off equal in amount to his claim must pay the defendant his costs of the whole action; for he has failed in the whole action. Whereas if the defendant can plead only a counterclaim for the same amount, the plaintiff will recover his costs of the claim, and the defendant only his costs of the counterclaim, which is treated as a cross-action by the defendant against the plaintiff. The proper principle of taxation in such a case is laid down by Brett, L.J., in *Baines v. Bromley*, 1881, 6 Q. B. D., at p. 695, and in *Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500; and see COSTS, Vol. IV. p. 56. Sec. 116 of the County Courts Act, 1888, does not apply to any counterclaim (*Blake v. Appleyard*, 1878, 3 Ex. D. 195; *Lewin v. Trimming*, 1888, 21 Q. B. D. 230).

There are, however, two instances in which a counterclaim, like a set-off under the former practice, serves only as a defence and not as a cross-action—or, to use the time-honoured metaphor, can be used only as a shield, and not as a weapon of offence. If a debt be assigned, the debtor may in certain cases (see ASSIGNMENT OF CHOSSES IN ACTION, Vol. I. p. 571) set-off or counterclaim against the assignee a debt due from the assignor to himself; but if the amount of such set-off or counterclaim exceeds the amount of the debt assigned, the defendant can recover nothing from the assignee; he must sue the assignor for the balance (*Young v. Kitchin*, 1878, 3 Ex. D. 127, approved in *Government of Newfoundland v. Newfoundland Rly. Co.*, 1888, 13 App. Cas. 199). A similar

rule is applied when a sovereign prince over whom our Courts have no jurisdiction (*Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149) submits to bring an action in this country. The defendant is allowed to plead any set-off or counterclaim against him which is an answer to his demand; but not to recover any judgment against him for the excess, or to raise any counterclaim which is "outside of and independent of the subject-matter of" the claim (*Imperial Japanese Government v. P. & O. Navigation Co.*, [1895] A. C. 644; *South African Republic v. Compagnie Franco-Belge, etc.*, [1897] 2 Ch. 487; [1898] 1 Ch. 190).

Counterclaim by a Plaintiff, etc.—In answer to a counterclaim, the plaintiff may himself plead a counterclaim in respect of any cause of action which has accrued to him since writ, provided it arises at the same time and out of the same transaction as the counterclaim (*Toke v. Andrews*, 1882, 8 Q. B. D. 428). But he cannot do this if such cause of action had arisen before writ; in that case he must amend his Statement of Claim (*James v. Page*, 1888, 85 L. T. Jo. 157). A third party brought in as defendant to a counterclaim cannot counterclaim in the action against either plaintiff or defendant (*Street v. Gover*, 1877, 2 Q. B. D. 498; *Alcoy and Gandia Rly. v. Greenhill*, [1896] 1 Ch. 19).

VII. REPLY, ETC.

If no Defence be delivered, the plaintiff may sign judgment by default (see DEFAULT, Vol. IV. p. 478). If the defendant has paid a sum of money into Court, and the plaintiff is content to accept that sum in satisfaction of his claim, he should deliver no Reply, but give the defendant a notice in Form No. 4 of R. S. C., Appendix B. If a Defence be delivered, and it contains sufficient admissions, the plaintiff may move for judgment thereon under Order 32, r. 6, or for an order that the defendant pay into Court the money which he admits is in his hands (*Neville v. Matthewman*, [1894] 3 Ch. 345; *Nutter v. Holland*, *ibid.* 408; *Compton v. Burton*, [1895] 2 Ch. 711). Next, the plaintiff's counsel must consider whether the Defence presents any answer to the claim, or whether the answer suggested is properly pleaded. If not, it may be necessary to apply to have it struck out or amended, or for particulars. A sham Defence may be struck out as an abuse of the process of the Court (*Critchell v. L. & S.-W. Rly. Co.*, [1907] 1 K. B. 860). If there is a counterclaim, it must be tested and contested precisely as though it were a Statement of Claim (see *ante*, p. 169). Then, again, it may be that the defendant has hit a blot in the plaintiff's pleading. If the Defence has raised some well-founded objection to the Statement of Claim, the plaintiff should set it right at once before it is too late. He may amend his Statement of Claim once without any leave, provided he does so before the expiration of the time limited for Reply, and before replying (Order 28, r. 2; and see AMENDMENT IN CIVIL PROCEEDINGS, Vol. I. p. 332). But this rule does not enable a plaintiff to add new parties or to increase the total amount claimed on the writ. For any such amendment leave is necessary, which can be granted in a proper case under Order 16, r. 11, or Order 17, rr. 2 and 4, or Order 28, r. 1. And a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which, since the issue of the writ, have become barred by the Statute of Limitations (*Weldon v. Neal*, 1887, 19 Q. B. D. 394). Where the action has been brought on a substantial

cause of action, to which a good defence has been pleaded, the plaintiff will not be allowed to amend his claim by including in it, for the first time, a trivial and merely technical cause of action, which such defence may not cover (*Dillon v. Balfour*, 1887, 20 L. R. Ir. 600). Sometimes it may be necessary for the plaintiff to amend by adding a new defendant (*Edward v. Lowther*, 1876, 45 L. J. C. P. 417; 34 L. T. 255; *Montgomery v. Foy, Morgan & Co.*, [1895] 2 Q. B. 321). In all these cases the party amending must pay all costs occasioned by the amendment, unless the Master otherwise order (Order 28, r. 13).

Is any Reply necessary?—Except in Admiralty actions, no Reply can now be delivered without leave (Order 23, r. 1). If the plaintiff desires merely to contradict the facts alleged by the defendant, leave will not be given for him to deliver any Reply; for if no further pleading be delivered, the pleadings will be treated as closed, and all material statements of fact in the defence will be deemed to have been denied and put in issue (Order 27, r. 13). See JOINDER OF ISSUE. But sometimes it may be necessary for the plaintiff to allege new facts or raise an objection in point of law; and in such cases leave to deliver a special Reply will be readily granted. "The plaintiff must raise by his pleading all such grounds of reply as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleading, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law or Statute of Frauds" (Order 19, r. 15). "The Reply is the proper place for meeting the Defence by confession and avoidance" (*per James, L.J.*, in *Hall v. Eve*, 1876, 4 Ch. D., at p. 345).

The plaintiff must not in his Reply raise any new ground of claim, or allege any fresh fact inconsistent with his previous pleading (Order 19, r. 16). To do so would be a *departure* (see *ante*). But he may in his Reply explain and define the nature and extent of the claim made in his previous pleading; for this is only what was formerly called a new assignment (Order 23, r. 6).

Reply and Defence to Counterclaim.—Where a counterclaim has been pleaded, the Master will give leave to deliver a Reply and Defence to Counterclaim; for the plaintiff's answer to a counterclaim is really a Defence, and is therefore subject to the rules applicable to a Defence (Order 23, r. 4). The plaintiff is not allowed in his Reply to deny generally the facts alleged by the defendant in a counterclaim; he may not join issue on it; "he must deal specifically with each allegation of fact of which he does not admit the truth, except damages" (Order 19, r. 17). He must plead to it as though it were a Statement of Claim (*Benbow v. Low*, 1880, 13 Ch. D. 553; *Green v. Sevin*, 1879, 13 Ch. D. 589). He may even counterclaim to it in certain cases (see *ante*, p. 128). He may pay money into Court in satisfaction of it; and such a payment will have the same effect on costs, etc., as payment into Court by a defendant (Order 22, r. 9; *Hutchinson v. Barker*, 1894, 71 L. T. 625). He may set up any ground of defence to a set-off or counterclaim which arises after the Defence or the Reply has been delivered in the manner indicated in rules 1 and 2 of Order 24, *ante*, p. 172.

Rejoinder, etc.—The defendant's answer, if any, to a Reply is called a Rejoinder; but it is seldom necessary, even where a counterclaim has been pleaded. Further pleadings are possible; there can be a surrejoinder, a rebutter, and a surrebutter; but they are very seldom

met with now. Still the principle of rule 15 of Order 19 (*ante*, p. 172) applies to all these subsequent pleadings. Hence, if the defendant desires to give evidence at the trial of any fresh fact by way of confession and avoidance, in answer to the plaintiff's Reply, he must allege it specially in a Rejoinder. But he can only do this by leave; he must satisfy the Master that a special Rejoinder is necessary. No pleading subsequent to Reply, other than a joinder of issue, can be pleaded without leave of a Master, and then only upon such terms as he shall think fit (Order 23, r. 3).

As soon as any party has simply joined issue upon the preceding pleading of the opposite party, or—what will have the same effect—has delivered no pleading in reply to it within the time prescribed, the pleadings as between such parties will be deemed to be closed (Order 27, r. 13), the issues are clear, and the parties can at once prepare for trial. At the trial the judge has full power to add, strike out, or substitute a plaintiff or defendant (Order 16, r. 12), or to amend any defect or error in any pleading or proceeding on such terms as may seem just (Order 28, rr. 1, 6, 12).

VIII. TRIAL WITHOUT PLEADINGS.

On a summons for directions in any action the judge or Master may make an order dispensing with pleadings (Order 30, r. 2). When the case is going to be transferred to the Commercial Court, the Master usually orders that the parties shall deliver to each other, not pleadings, but "points of claim, with particulars," and "points of defence, with particulars;" phrases which exactly describe what pleadings ought to be.

In November 1893 an order was made (Order 18A), which enables a plaintiff, if he thinks fit, to proceed to trial without pleadings provided the indorsement of his writ contains "a statement sufficient to give notice of the nature of his claim, or of the relief or remedy required in the action," and also a statement that "if the defendant appears, the plaintiff intends to proceed to trial without pleadings." The defendant may nevertheless apply for a direction that pleadings shall be delivered. If he does not, he must give notice to the plaintiff if he intends to rely at the trial on any set-off or counterclaim, or on any of the defences, specified in rule 5 of that Order; and in such notice he must state "the grounds and particulars upon which he relies." The plaintiff's "sufficient statement," and the defendant's notice stating "grounds and particulars" are very like pleadings. This procedure is very rarely adopted now, and Order 18A should be repealed.

At the same date (November 1893) Order 14 was re-written, and now when a plaintiff applies for summary judgment under that Order, the Master has power (r. 8), while granting leave to defend, to order the action to be set down for trial immediately, without further pleadings. But the plaintiff cannot apply for summary judgment under Order 14, unless he has previously placed on his writ a special indorsement, which is a pleading (*Anlaby v. Prætorius*, 1888, 20 Q. B. D., at p. 770). And the Master, before giving leave to defend, has before him an affidavit in which the defendant has disclosed his defence.

Where there is no real dispute as to the facts, the parties to any cause or matter, instead of asking for leave to deliver pleadings, may concur in stating the questions of law which have arisen, in the form of

a "special case" for the opinion of the Court (Order 34, rr. 1, 2). Again, the Court or a judge may direct that any question of fact shall be stated for trial in what is technically called "an issue;" and such issue will be entered for trial and tried in the same manner as any issue joined in an ordinary action (Order 33, rr. 1, 2). But this is seldom done with respect to any main question in the action. Issues under this Order are usually directed to determine whether a particular person was or was not a member of the defendant firm at the time the contract sued on was entered into with that firm, or to determine the liability of a person summoned as a garnishee, or to decide between rival claimants to property taken in execution by the sheriff or in the hands of a stakeholder, or otherwise in aid of execution. They generally deal only with some subsidiary question which arises after the main questions in the action have been decided. They do not therefore take the place of pleadings.

In Criminal Cases.—This subject has been fully dealt with under INDICTMENT, except as to certain special pleas which fall under the heads following:—ABATEMENT; AUTREFOIS ACQUIT; AUTREFOIS CONVICT; GENERAL ISSUE; JUSTIFICATION.

Pleas of the Crown.—1. This term was originally applied to those criminal offences the cognisance whereof was reserved to the King's Courts. The common-law County Courts and Courts of borough and manor had jurisdiction over certain offences (Staundforde, *Pl. Cr.* 1). Those cognisable in the County Court were termed pleas of the sheriff. The pleas of the Crown appear to have been originally those reserved to the Crown on the grant of a judicial franchise, *i.e.* the offences affecting the general peace or interests of the realm or revenue. In proceedings for such matters they were declared to be *contra pacem Domini Regis* (see PEACE, THE). Magna Carta (1215, Art. 24) made it illegal for sheriffs, constables of castles, coroners, or other bailiffs to hold pleas of the Crown (see CORONER, Vol. III. p. 673). Such pleas were dealt with either *in curia regis* or by the justices in eyre; and the edition by Professor Maitland of the *Gloucester Eyre Roll* of 1221 illustrates the nature of the circuit of the King's justices, and the limits then already placed on local jurisdictions.

On the establishment of the commission of the peace, all criminal offences, save those cognisable in Courts leet, were treated as pleas of the Crown, and dealt with under royal commissions only, and "pleas of the Crown" is thenceforth equivalent to criminal law (1 Steph. *Hist. Cr. Law*, 82-85).

The earlier treatises on English criminal law dealt with criminal law under the old style of pleas of the Crown. Bracton, bk. iii., is entitled *De Coronâ*; and see Glanville and Fleta.

Then follow the works of Staundforde (*Pleas of the Crown*), Coke (3 *Inst.*), Hale (*History of the Pleas of the Crown*), Hawkins (*Pleas of the Crown*), and East (*Pleas of the Crown*). In the nineteenth century the term was dropped, and the works of Archbold, Chitty, Russell, and Stephen deal with the criminal law by reference to modern conceptions, and without regard to its ancient nomenclature.

2. Hale also includes under pleas of the Crown certain civil matters concerning franchises and liberties, and proposed to treat of them; but his work on this subject, if ever written, has not survived (1 *Hist. P. C.*, *Proœmium*); and causes affecting the Crown lands,

revenues, and prerogatives are not now spoken of as pleas of the Crown.

Pleasure Grounds.—By sec. 164 of the Public Health Act, 1875, 38 & 39 Vict. c. 55, Part IV., it is provided that any urban authority may purchase or take on lease, lay out, improve, and maintain lands for the purpose of being used as public walks and pleasure grounds. The 22 Vict. c. 27 facilitates grants of land near populous places for their use, for the regulated recreation of adults, and as playgrounds for children.

Disused burial grounds may be converted into open spaces and so preserved in the custody of local authorities as open spaces accessible to the public (44 & 45 Vict. c. 34, ss. 4 and 5; 50 & 51 Vict. c. 32, s. 5; 62 & 63 Vict. c. 30, s. 14).

Customary right of recreation on the land of another cannot exist as a public right generally, being confined to the inhabitants of any particular district (*Bourke v. Davis*, 1889, 44 Ch. D. 110).

The former powers and duties of overseers and churchwardens with respect to village greens, etc., are now transferred to parish councils (Local Government Act, 1894, s. 6 (1) (c)), and these councils also have additional powers to acquire land for recreation grounds, etc. (*ibid.*, ss. 8, 9).

Unless specially empowered by public or private statute a local authority has no right to charge for admission to a public recreation ground as this trespasses on a public right (*A.-G. v. Leeds Corporation*, 1880, 24 Sol. J. 539), but see (where it is adopted) 53 & 54 Vict. c. 59, s. 44 (1), which gives a limited right of closing.

In general public pleasure grounds are not liable to rates as the public are not regarded as being in rateable occupation of them (*Manchester Corporation v. Chorlton Union*, 1899, 15 T. L. R. 327).

Under Part VI. of the Public Health Acts Amendment Act, 1907, 7 Edw. VII. c. 53, the Local Government Board may make rules and regulations under sec. 76 of the Act, prescribing restrictions or conditions subject to which any powers conferred by the section shall, with respect to any area in a public park or pleasure ground, be exercisable in relation to the enclosure or setting apart of the area, or in relation to the use of the area as the site of a building or convenience.

In addition to existing powers, the following new powers, subject to the regulations above mentioned, are given to local authorities:—

1. To enclose a frozen pond for skating, and to charge admission thereto, but only on condition that three-quarters of the available ice is free.

2. To set apart any portion of a ground for games, and to exclude non-players therefrom.

3. To provide apparatus for games, and to make a charge for use.

4. To pay all or part of the expenses of bands of music.

5. To enclose a space, not exceeding one acre, for the use of persons listening to music, and to charge admission thereto.

6. To provide seats and chairs, and charge for the use thereof.

7. To provide and maintain reading-rooms, pavilions, refreshment-rooms, etc., and under certain conditions to charge for the use of the same.

Expenses incurred by the council are payable out of its ordinary

fund, but any charges for music must not exceed such sum as would be raised by a penny rate.

By 34 Vict. c. 13, repealed and re-enacted by the Mortmain and Charitable Trusts Act, 1888, 51 & 52 Vict. c. 42, s. 6 (1), proceeding on the preamble that it is expedient to facilitate gifts of land for the purpose of forming public parks, schools, and museums, it is provided that all gifts and assurances of land, up to a limited acreage, and whether made by deed or by will or codicil for such purposes, and all bequests of personal estate to be applied in or towards the purchase of land for such purposes, shall be valid, notwithstanding the Statutes of Mortmain. As to enclosing Kennington Common, see 15 & 16 Vict. c. 29. See also the Open Spaces Act, 1906, 6 Edw. VII. c. 25, and OPEN SPACES.

Pledge.—See PAWN, where also the subject of Fraudulent Pledge is dealt with.

Pleins pouvoirs.—See PLENIPOTENTIARY.

Plenary.—A term used to denote the fact that a benefice is full (*plenus*), or in the possession of an incumbent. By the common law it was a good defence to an action *Quare impedit* (*q.v.*), but the Statute of Westminster the Second, 13 Edw. I. st. 1, c. 5 (1285), provided that it should be no defence if the rightful patron's action were brought within six months. The King, however, can bring his action even after the six months have expired (2 *Inst.* 361).

Plenary.—In proceedings in the ecclesiastical courts, a “plenary” cause is one in which is required a solemn order in the proceedings and the completion of all formal steps, as opposed to “summary” causes.

Plene administravit; Plene administravit præter.—The pleas in defence of an executor or administrator who has not assets sufficient to satisfy the debt for which he is sued. The essential part of the first, before the Judicature Acts, was that the executor had none of the testator's goods which were, at the testator's death, in his hands as executor to be administered, nor had had at the time of the commencement of the suit, or even since that time; and this plea, which was essential before the Judicature Acts (see *Ramsden v. Jackson*, 1737, 1 Atk. 292; *Erving v. Peters*, 1790, 3 T. R. 685; 1 R. R. 794; *In re Higgin's Trusts*, 1861, 2 Gif. 562), seems to be still necessary, though, in view of the amendments which may now be made in pleadings, the omission to plead this defence at the proper time would not now be fatal, as it was held to be in *Erving v. Peters*, and *Rock v. Leighton*, there cited. It has been decided, however, that an executor may now pay one debt after action brought in respect of another (*In re Radcliffe*, 1878, 7 Ch. D. 732; *Vibart v. Coles*, 1890, 24 Q. B. D. 364), but he may not do so after a decree for administration (*In re Barrett*, 1889, 43 Ch. D. 70; *In re Wells*, 1890, 45 Ch. D. 569). The rule as to the necessity of the plea applied also in the case of the executor of an executor, who had to plead either that the original executor fully administered, or that he himself had no assets of the first executor to make good a devastavit by him (*Wells v. Fyde*, 1808, 10 East, 315).

The plea of *plene administravit* might be replied to by alleging that at the commencement of action the defendant had assets, whereupon the burden lay upon the plaintiff (*Mara v. Quin*, 1794, 6 T. R. 10; *Webster v. Blackman*, 1861, 2 F. & F. 490), and this burden was not discharged by proving that assets came to the defendant's hands after action brought (*s.c.*). The defendant cannot rely upon a *devastavit* committed by him, but he may prove that the assets have been exhausted by paying other creditors than the plaintiff, even if their debts are of equal degree to the plaintiff's debt (*Vibart v. Coles*, *ubi supra*). The defendant can under the plea put in evidence retainer of a debt due to himself retained by him even against a debt of superior degree where he has distributed the estate without notice of such debt (*Re Fludyer*, [1898] 2 Ch. 562). The defendant could not give in evidence under this plea the fact that there were outstanding debts (unpaid) of a higher nature than the plaintiff's, such matter must have been specially pleaded (Bull. N. P. 141). Judgment against an executor upon a plea of *plene administravit* was only to such an amount as assets were proved to be on his hands. Executors, when defendants, have no privilege as to costs, but they are recoverable against them *de bonis propriis* (*Marshall v. Wilder*, 1829, 9 B. & C. 655, 658).

An executor who is sued for a debt of his testator should be careful if he wishes to exercise his right of retainer either to set up his right in the action or to give it in evidence under a plea of *plene administravit* otherwise, although the judgment is against him *de bonis testatoris*, he may, if the estate is insolvent, have to pay the debt out of his own pocket (*Re Marvin*, [1905] 2 Ch. 490).

The plea of *plene administravit præter* was resorted to by an executor or administrator sued for an inferior debt who had notice of one of a superior nature, and had not assets to pay both; the essence of the plea being that there were assets to pay the superior debt, and no more. Since 1880 specialty debts have not had any priority over simple contract debts, but such a plea may be necessary in the case of an executor or administrator sued for debt when a judgment is outstanding against the estate, and there are not assets sufficient for both. An executor or administrator should allege the facts upon which he seeks to set up a retainer, if there be no assets for that and for the debt upon which he is sued, and the existence of debts of a higher nature than the one sued for, and no assets *ultra*, must be specially pleaded; and on this defence the plaintiff may either join issue, or reply specially, or apply under R. S. C., Order 32, r. 6, for judgment of future assets *quando acciderint*. The plaintiff, in reply to a defence of an outstanding judgment and no assets *ultra*, may reply that it has been satisfied, or that it is kept on foot collusively.

The plaintiff, on either of these pleas being put in, may confess the plea and take judgment of assets of the deceased *quando acciderint*, whereby he admits full administration up to that time, in which case the defendant executor is not liable for costs personally; but the plaintiff may take judgment for them against the assets *quando*. The plaintiff cannot have execution upon such a judgment except by leave under Order 42, r. 23.

See also EXECUTORS AND ADMINISTRATORS.

[*Authorities*.—Williams on *Executors*, 9th ed., 1893; 10th ed., 1583; Bullen and Leake's *Precedents of Pleadings*, 5th ed., 1897; 6th ed., 1905, pp. 649, 651.]

Plenipotentiary is, strictly speaking, a diplomatic agent furnished with full powers (*pleins pouvoirs*) for specific negotiations. In practice it has become a second title for DIPLOMATIC AGENTS of the second class, and in the British diplomatic service, in some cases, of the third class. It no longer implies the possession of unlimited powers.

Plough-bote.—See ESTOVERS, Vol. V., at p. 360.

Plough-land.—Another name for a hide of land.

Plunderage is an obsolete term of maritime law, said to mean embezzling goods on shipboard (Lely, *Dictionary*).

Plural.—Unless the contrary intention appears, in statutes passed since 1850, words importing the masculine gender include females, the singular includes the plural, and the plural the singular. See 52 & 53 Vict. c. 63, s. 1. See also INTERPRETATION ACT, Vol. VII. p. 401.

Pluralities.—I. *Plurality* is the simultaneous holding by a spiritual person of two or more benefices or preferments involving the cure of souls. From the earliest times pluralists have been the object of ecclesiastical censures, for which Van Espen (ed. 1753), vol. i. p. 682; vol. iii. pp. 226, 439; and vol. iv. p. 51, may be consulted. The specially English history of the subject will be found in Lindwood, at p. 135 of the Oxford edition of 1679, and pp. 126-128 of the "Constitutions of Othobon," in the same volume, or in Gibson's *Codex*, tit. xxxvii. p. 903 of the Oxford edition of 1761.

The present law is chiefly contained in the Pluralities Act, 1838, 1 & 2 Vict. c. 106, as amended by the Pluralities Act, 1850, 13 & 14 Vict. c. 98, and the Pluralities Acts Amendment Act, 1885, 48 & 49 Vict. c. 54. By sec. 124 of the principal Act, and sec. 3 of the first amending Act, the term *benefice* is defined as meaning "benefice with cure of souls and no other;" and as comprehending "all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging . . . to any church," any other Act to the contrary notwithstanding. *Cathedral preferment* is defined as comprehending "every deanery, archdeaconry, prebend, canonry, office of minor canon, priest vicar, or vicar-choral, having any prebend or endowment belonging thereto, or belonging to any body corporate of persons holding any such office; and also every precentorship, treasurership, subdeanery, chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every mastership, wardenship, and fellowship in any collegiate church." But under 4 & 5 Vict. c. 39, s. 3, and 13 & 14 Vict. c. 98, s. 11, an honorary canonry, or any prebend dignity or office, with an endowment, if any, under £20 per annum, is not reckoned a preferment.

The subsisting enactments prohibiting pluralities are as follows:—

1. No spiritual person with more benefices than one can hold cathedral preferment or another benefice (s. 2 of 1 & 2 Vict. c. 106).
2. No spiritual person with cathedral preferment and one benefice can hold any other cathedral preferment or any other benefice (*ibid.*).
3. No spiritual person holding "any preferment in any cathedral or collegiate church" can hold therewith any other preferment in any

cathedral or collegiate church, except an office, the duties of which are statutablely or accustomedly discharged by the holder of the preferment (*ibid.*)

4. No spiritual person holding a benefice can hold a second benefice, unless the following conditions are satisfied:—(a) The churches or benefices are within four miles of one another by the nearest road, and (b) the value of one does not exceed £200 (1 & 2 Vict. c. 106, ss. 4, 129; 13 & 14 Vict. c. 98, s. 1; 48 & 49 Vict. c. 54, s. 14).

5. No dean can hold the office of head of a college at Oxford or Cambridge, provost of Eton, warden of Winchester, or master of the Charterhouse (13 & 14 Vict. c. 98, s. 5); nor any benefice, except one situate within the city or town of the cathedral or collegiate church in which he holds the deanery, and of value under £500 per annum (13 & 14 Vict. c. 94, s. 19; *R. v. Champneys*, 1871, L. R. 6 C. P. 384; and 36 & 37 Vict. c. 64, s. 1).

6. No head of a college at Oxford or Cambridge, or warden of Durham, if also holding a benefice, can hold therewith any cathedral preferment or any other benefice; or if also holding a cathedral preferment, can hold any benefice, except a benefice or preferment permanently attached to his office (13 & 14 Vict. c. 98, s. 6).

7. No minor canon (including vicars or vicars-choral) can hold with his minor canonry any benefice, except one within six miles of the cathedral or collegiate church (3 & 4 Vict. c. 113, s. 46; 4 & 5 Vict. c. 39, s. 15).

However, under sec. 2 of the principal Act, and sec. 10 of 4 & 5 Vict. c. 39, an archdeacon may hold with his archdeaconry two benefices, the population of one of which is under 3000, or the other under 500, and one of which is locally situate within the diocese; or one benefice in the diocese, and one cathedral preferment in the cathedral church of the diocese.

By 26 Hen. VIII. c. 14, s. 8, a suffragan bishop may hold two benefices. But it seems clear that this section is not now in force (13 & 14 Vict. c. 98, ss. 1, 7).

The right which thus, under certain circumstances, exists to hold two benefices can only be exercised upon a licence or dispensation being obtained from the Archbishop of Canterbury, who must be satisfied of the fitness of the person, and of the expediency of allowing the two benefices to be holden together. In case the archbishop refuses, the applicant can appeal to His Majesty in Council (1 & 2 Vict. c. 106, s. 6).

The applicant for a dispensation must deliver to the bishop of the diocese in which each benefice is situate a certificate showing the annual value, annual outgoings, population, and relative distance of the benefices. The bishop may inquire as to the accuracy of the statements, and within one (calendar) month must deliver to the archbishop his certificate of the above facts (1 & 2 Vict. c. 106, s. 7).

The mode in which the provisions of the enactments against plurality are enforced is simply that the taking a preferment by a clergyman, which cannot under the Acts be held with his existing preferment, *ipso facto* vacates the original preferment (1 & 2 Vict. c. 106, s. 11; 13 & 14 Vict. c. 98, s. 7). The vacancy occurs on being "admitted, instituted, or licensed" to the new preferment.

A person holding two preferments, and receiving a new one, with which he is entitled to retain one but not both of his former prefer-

ments, must elect which he will retain, and signify his choice to the bishop in the manner prescribed in sec. 11 of 1 & 2 Vict. c. 106.

II. The subject of *Non-residence*, perhaps because it is dealt with by the Pluralities Act, is usually dealt with under that heading.

An incumbent is required by the Act to reside on his benefice and in the house of residence, if any, belonging thereto; and his total absence during the year must not exceed three months or ninety days (1 & 2 Vict. c. 106, s. 32). There are, however, certain exemptions:—

1. The bishop can grant a licence to reside out of the house of residence if that is unsuitable, or if the incumbent owns and occupies a dwelling-house in the parish (1 & 2 Vict. c. 106, ss. 33, 43).

2. The heads of colleges at Oxford or Cambridge, the warden of Durham, the headmasters of Eton, Winchester, or Westminster, not having respectively more than one benefice with cure of souls, are exempt from any penalty for non-residence on any benefice (1 & 2 Vict. c. 106, s. 37).

3. Temporary non-residence for the purpose of discharging the duties of dean, professor in the University of Oxford or Cambridge, chaplain to any of the Royal Family, or to an archbishop, or to the House of Commons, chancellor or vicar-general or commissary of any diocese, archdeacon, dean, sub-dean, or preacher in the Chapels Royal, preacher at the Inns of Court, provost of Eton, warden of Winchester, master of the Charterhouse, principal of St. David's or King's College is not counted as non-residence (1 & 2 Vict. c. 106, s. 38).

4. A person holding two benefices may reside on either, and the residence of a suffragan bishop over a diocese counts as residence on his benefice (1 & 2 Vict. c. 106, s. 32, and 26 Hen. VIII. c. 14, s. 7).

5. Performance of cathedral duties by a canon, prebendary, vicar-choral, or minor canon will justify five months' absence from his benefice (1 & 2 Vict. c. 106, s. 39).

The bishop is empowered to grant a licence for non-residence to an incumbent in the case of mental or bodily incapacity, or of dangerous illness of wife or child, or where no suitable residence is obtainable (1 & 2 Vict. c. 106, ss. 42, 43); and the bishop, with the confirmation of the archbishop of the province, can grant a licence of non-residence for any other reason (1 & 2 Vict. c. 106, s. 44).

Where an incumbent fails to reside on his benefice, and has neither exemption nor licence, he is liable to be proceeded against (see 32 & 33 Vict. c. 109, s. 2)—(a) for penalties under 1 & 2 Vict. c. 106, s. 32 (*Rackham v. Bluck*, 1846, 9 Q. B. 191; 16 L. J. Q. B. 82; S. C. 1 Rob. 327); (b) by monition to return and reside, enforceable by sequestration under 1 & 2 Vict. c. 106, ss. 54-57, 110 (*Bartlett v. Kirwood*, 1853, 2 El. & Bl. 771; *In re Bartlett*, 1848, 18 L. J. Ex. 25). If the sequestration continues for one year, or two such sequestrations are incurred in two years, the benefice becomes void (1 & 2 Vict. c. 106, s. 58), or the bishop may appoint a curate under 1 & 2 Vict. c. 106, s. 75.

III. *Commendam*.—In former times the enactments against plurality were evaded by this means, whereby a vacant benefice might be committed to a holder of other benefices until it could be provided with an incumbent (see under COMMENDAM, IX). Should an incumbent be never provided, then the temporary holder would enjoy the benefice indefinitely.

The benefice was then said to be granted *in commendam*. Commendams were abolished by 6 & 7 Will. iv. c. 77, s. 18 (see *Colt and Glover v. Bishop of Coventry*, 1613, Hob. 140-165, where the old law is fully stated and the different species of *commendam* described).

The permanent junction of two benefices is dealt with under UNION OF BENEFICES. When two benefices have been permanently united they count as one for all questions of plurality.

No spiritual person may serve more than two benefices in one day, unless in case of "unforeseen and pressing emergency," in which case he is to forthwith report the circumstances to the bishop of the diocese (1 & 2 Vict. c. 106, s. 106; see also Canon 48).

[*Authorities*.—Phillimore, *Ecc. Law*; Gibson, *Cod.*; Lindwood; F. W. Maitland, "Execrabilis" in the Common Pleas, 12 *Law Quarterly Review*, 174.]

Pluries.—A writ of pluries (Latin "as often"), or more fully *pluries capias*, used to issue in case a person accused of a misdemeanor was not to be found under a writ of *capias* and a writ of *alias*; that is, it was issued in the third instance after these writs had been ineffectual. In the case mentioned, first of all a writ of *venire facias*, which is of the nature of a summons to appear, is issued, whereupon, if it appears that the party has lands in the county, a distress may be levied from time to time on these lands until he appears; but if the sheriff's return is to the effect that there are no lands in the bailiwick, then a writ of *capias* can be issued commanding the sheriff to take his body, and have him at next Assizes, which writ, if ineffectual, was formerly followed as above stated. Now, by the Crown Office Rules, 1906, r. 99, only one writ of *capias* need be issued in such cases.

Plying for Hire.—See CAB.

Poaching.—See GAME LAWS.

Pocket Judgment.—See STATUTE MERCHANT.

Pocket Sheriff.—When the Sovereign appoints a person sheriff who is not one of the three nominated in the Exchequer, he is called a pocket sheriff (1 Black. *Com.*, 342).

Poet Laureate.—The custom of crowning poets, says the Abbé Resnal, is nearly as old as poetry itself (*vide Mémoires de l'Académie des Inscriptions*, 1736, vol. x. p. 507). Formerly it was the custom of our universities when conferring the degree of grammar, which included rhetoric and versification, to present the new graduate with a wreath of laurel as the ensign of the degree taken of mastership in poetry, after which he was usually styled *poeta laureatus*.

This custom was probably borrowed from the Empire, where as early as the days of Frederick I. the crowning of poets had been a custom of the emperors; and this, again, may be traced to those ancient agones or certamina of poets instituted by Domitian under the old Roman Emperors (Selden, *Titles of Honour*, 3rd ed., 1672, p. 339).

In England, since the sixteenth century, the title has been held by

the King's poet laureate only, who originally was nothing more than a graduated rhetorician in the service of the King. The first mention of this royal office occurs in the middle of the fifteenth century, when John Kay, in dedicating a prose translation of the *Siege of Rhodes* to Edward iv., described himself as "hys humble poet laureate;" but in far earlier times there was a "miserable dependent" in the royal household who was called Versificator Regis. Richard Cœur de Lion's versifier was Gulielmus Peregrinus. In 35 Hen. III. we find mention of one Master Henry, the versificator, to whom arrears of salary amounting to 100 shillings were due (Madox, *Hist. of Exch.*, 2nd ed., p. 391*n.*).

The two offices were undoubtedly the same. "The barbarous and inglorious name of versifier" was, as Warton suggests, probably exchanged for the more elegant and polite one of poet laureate, at the wish of the versifier himself, in the fourteenth century. The office does not seem to have become permanent until 1630, when the letters patent under which the present office is held were granted.

The duties never seem to have been many. Laurence Eusden, "by very few been read, by fewer praised," introduced the practice of celebrating the King's birthday in an ode. This ridiculous custom, though it evoked the anathemas of Warton and Gibbon, even in an age when "the best of Kings" afforded "the most just and copious theme for panegyrick," was kept up until the death of Pye in 1813. Sometimes the office has been held together with that of historiographer. In 1486 Andrew Bernard held the two offices, and so later did Dryden and Shadwell. But if the duties of the versifier royal have been few, his wages have been correspondingly small. In 41 Hen. III., Master Henry de Abrinces, the versifier, received 6d. per day, paid, it seems, half-yearly. In 1615 James I. granted his laureate a yearly pension of 100 marks, which was increased by letters patent of Charles I. to £100, with an additional grant of one tierce of Canary Spanish wine, to be taken from the King's store of wine yearly. Early in the present century Pye was content to commute the grant of wine for an addition of £27 to his annual stipend. The present laureate receives £72 per annum.

[*Authorities.*—Selden, *Titles of Honour*, 3rd ed., 1672; *Mémoires de l'Académie des Inscriptions*, 1736; Warton, *History of English Poetry*, 1824; Disraeli, *Curiosities of Literature*, 1824; *Encyclopædia Metropolitana*, art. "Laureate," 1845.]

Poison.—1. Poisoning was punished by boiling alive under an Act passed in 1530 (22 Hen. VIII. c. 9), in consequence of a wholesale case of poisoning in the Bishop of Rochester's household, and the offender was boiled to death. The punishment was altered in 1547 (1 Edw. VI. c. 12), and murder by poisoning was directed to be treated like any other kind of murder; and so the law has remained ever since. See Archb., *Cr. Pl.*, 23rd ed., 787.

It is felony—(a) To administer or cause to be administered to, or to be taken by, any person, any poison or destructive thing with intent to commit murder; and (b) to attempt to administer or to cause to be administered, or to be taken by, any other person, any poison or destructive thing with intent to commit murder; (c) unlawfully to use chloroform, laudanum, or any stupefying or overpowering drug on another with intent to commit or assist another in committing an indictable offence. The maximum punishment in either case is penal servitude for life (24 & 25 Vict. c. 100, ss. 11, 14, 22).

Unlawfully and maliciously administering to another any poison or destructive or noxious thing is (*d*) felony punishable by a maximum of ten years' penal servitude, if the intent is to endanger life or inflict grievous bodily harm; or (*e*) misdemeanor punishable by a maximum of five years' penal servitude, if the intent is to injure, aggrieve, or annoy the recipient. On a trial for the felony, if the evidence so warrants, the jury may acquit of the felony and convict of the misdemeanor (24 & 25 Vict. c. 100, ss. 23-25). See *Tulley v. Corrie*, 1867, 10 Cox, C. C. 640.

As to the use of poisons to procure miscarriage, see ABORTION, Vol. I. p. 33. As to the use of poisons, etc., with intent to facilitate the commission of sexual offences, see *R. v. Wilkins*, 1861, L. & C. 88; and RAPE.

Administration of poison, to be within these enactments, need not be by the hand of the accused. It may be sent through an innocent or guilty agent, or put where the recipient would be likely to take it as medicine, or food, or drink (*R. v. Williams*, 1844, 1 Den. C. C. 39; *R. v. Michael*, 1840, 2 Moo. C. C. 120; and see Archbold, *Crim. Pl.*, 23rd ed., 816, 818, 847).

Under the Poisoned Grain Act, 1863, 26 & 27 Vict. c. 113, penalties recoverable summarily are imposed—(1) on persons who offer or expose for sale any grain, seed, or meal steeped in or mixed with a poisonous ingredient calculated to destroy life; (2) on persons knowingly and wilfully sowing, or placing on any ground or exposed place any grain, seed, or meal so poisoned. Half the penalty may be awarded to an informer not a constable, and an indemnity may be given to witnesses. The Act does not apply to the sale or use of poisonous solutions, infusions, or ingredients for dressing, protecting, or preparing grain or seed for *bonâ-fide* use in agriculture, or of grain or seed prepared therewith, such as arsenic, which is used to steep wheat (s. 4) (14 & 15 Vict. c. 13, s. 3).

Under the Game Act, 1831, 1 & 2 Will. iv. c. 32, s. 3, and the Ground Game Act, 1880, 43 & 44 Vict. c. 47, s. 6, it is unlawful to use poison to kill game or ground game (see GAME LAWS, Vol. VI. p. 336), and it is unlawful to use poison to destroy salmon or any other fish in rivers or ponds (24 & 25 Vict. c. 97, s. 32; c. 109, s. 5; 36 & 37 Vict. c. 71, s. 12; 47 & 48 Vict. c. 11, s. 7; *R. v. Vasey*, [1905] 2 K. B. 748; and see FISHERIES, Vol. VI. p. 97).

Under the Poisoned Flesh Prohibition Act, 1864, 27 & 28 Vict. c. 115, s. 3, poisoned flesh may not be set, laid, put, or placed on any land, except for rats, mice, and small vermin, if placed in a dwelling-house or enclosed garden attached thereto (or in drains attached thereto to which dogs cannot enter) or in the inside of stacks of agricultural produce. See DOGS.

The wilful and unlawful administration of poisonous or injurious drugs to horses, cattle, or other domestic animals, is summarily punishable if not done by the owner or by a person acting under his authority (39 & 40 Vict. c. 13). The Act is cumulative on other penalties of the law for injury to animals, but does not apply to prescriptions by horse doctors. It was passed to stop the practice by coachmen of giving arsenic with the object of improving the coats of their horses.

2. Special restrictions are placed by law on the sale of certain poisons. The sale of arsenic, and all colourless poisonous preparations of it, is regulated by 14 & 15 Vict. c. 13. The seller must enter in a book the particulars of sale (s. 1), and must not sell to an unknown

person or a person under age (s. 2); and must sell it coloured with soot or indigo, except for use in agriculture, or purposes for which the admixture would render it useless (s. 3). The Act does not apply to medical prescriptions.

The Pharmacy Act, 1868, 31 & 32 Vict. c. 121, contains a scheduled list of poisons, classified under two heads:—

(a) Arsenic, and its preparations; prussic acid; cyanides of potassium and all metallic cyanides; strychnine, and all poisonous vegetable alkaloids and their salts; emetic tartar; corrosive sublimate; cantharides; saon, and its oil; ergot of rye, and its preparations.

(b) Oxalic acid; chloroform; belladonna, and its preparations; essential oil of almonds, unless deprived of its prussic acid; opium, and all preparations of opium or of poppies.

The Pharmaceutical Society of Great Britain may, by resolution, declare that any article therein named should be deemed a poison; and the resolution, if approved by the Privy Council, and published in the *London Gazette*, operates as an addition to the schedule (31 & 32 Vict. c. 121, s. 2).

Under these powers (part 1) the following poisons have been added to the schedule:—

To Part I. Preparations of prussic acid, and of cyanide of potassium, and of all metallic cyanides, of strychnine and of atrophine (all these are put into the first part of the schedule). To Part II. preparations of corrosive sublimate, red oxide (red precipitate) of mercury, ammoniated mercury (white precipitate—December 20, 1869); carbolic acid (July 26, 1900), all compounds containing a scheduled poison prepared or sold to destroy vermin, tinctures and all vesicating liquid preparations of cantharides (December 20, 1869); choral hydrate, and its preparations (December 13, 1877); nux vomica, and its preparations (July 28, 1882); morphine, and its preparations (December 20, 1869). The vermin killers fall into that part of the schedule to which their poisonous ingredients belong, and the Pharmaceutical Society may, by approved resolution, shift them from one part to the other. See *Brown v. Leggett*, 1905, 22 T. L. R. 180.

No person may sell, or keep open shop for retailing, dispensing, or compounding any scheduled poison unless qualified and registered as a pharmaceutical chemist, or chemist and druggist (s. 1); and in dealing with such poisons or compounds containing an appreciable quantity of them, the person authorised must comply with the regulations of the Act as to keeping and selling (s. 15), which are as follows:—

(a) All the scheduled poisons must, whether sold by wholesale or retail, be distinctly labelled with the name of the article, the word poison, and the name and address of the seller.

(b) Poisons in the first part of the schedule, or added thereto, may not be sold to a person unknown to the seller unless introduced by a person known to him, and before delivery entry must be made in the poison-book of full particulars as to the sale.

The regulations do not apply to wholesale for export, or to retail dealers in the ordinary course of trade (so far as concerns the label on the package, nor as to the formalities as to poisons within the first part of the schedule), and do not affect the *Arsenic Act*, 1851.

The regulations, moreover, do not apply to medicine supplied by a legally qualified medical practitioner or apothecary, or dispensed by a person registered under the Pharmacy Acts, if it is distinctly labelled

with the name and address of the seller, and the ingredients are entered, with the name of the person to whom it is sold or delivered, in a book kept for the purpose (31 & 32 Vict. c. 121, s. 17; 32 & 33 Vict. c. 11, s. 3). The rights of veterinary surgeons are also preserved (31 & 32 Vict. c. 121, s. 16; 32 & 33 Vict. c. 117, s. 1), as are those of vendors of medicines containing poisons which are sold under letters patent, but not sellers of proprietary articles subject to medicine stamp duty. The result of recent judicial decisions is to prevent anyone but chemists from selling proprietary articles containing poison, and to require them to be labelled, however little they may contain of the scheduled poisons (*Pharmaceutical Society v. Armson*, [1894] 1 Q. B. 720; *Same v. Piper*, [1894] 1 Q. B. 686; *Same v. Delve*, [1894] 1 Q. B. 71; *Same v. White*, [1901] 1 K. B. 601). As to sales by a limited company, see *Pharmaceutical Society v. London and Provincial Supply Association*, 1880, App. Cas. 859.

The person on whose behalf a poison is sold is liable for the acts of his servants with respect to the regulations (*Same v. Wheeldon*, 1890, 24 Q. B. D. 683).

The penalty for breach of the regulations recoverable before a Court of summary jurisdiction is a fine not exceeding £5 for the first offence, and not exceeding £10 for a second or subsequent offence (31 & 32 Vict. c. 121, s. 17).

The penalty for selling poisons without qualification is £5, recoverable by action by the Pharmaceutical Society (s. 15).

Besides the penalties for non-observance of the above Act, persons who inadvertently sell goods containing poison may become liable under the Sale of Goods Act, 1893, for breach of conditions expressed or implied as to the freedom of the goods from deleterious elements (*Bostock v. Nicholson*, [1904] 1 K. B. 725), or under the Sale of Food and Drugs Acts (*Bent v. Ormerod*, [1901] 2 K. B. 290).

3. Independently of statute, it is the duty of persons who possess poisons to take care that they are so securely kept as not to cause injury to others. The rule is the same as with respect to other dangerous things acquired by a man for his own purposes. The most recent decision touching this liability, so far as concerns owners of property, is *Pointing v. Noakes*, [1894] 2 Q. B. 281. Carelessness in prescribing or administering poisons gives a cause of action to a person directly injured thereby (*Stretton v. Holmes*, 1890, 19 Ont. 286; *George v. Skivington*, 1869, L. R. 5 Ex. 1; and see *Kerry v. England*, [1898] A. C. 742; Beven on *Negligence*, 3rd ed.). If the negligence is sufficiently gross and is fatal, the negligent person may be convicted of MAN-SLAUGHTER (*R. v. Spencer*, 1867, 10 Cox. C. C. 525; Archbold, *Cr. Pl.*, 23rd ed., 787). For medico-legal notes on poisons, see TOXICOLOGY.

Police, Borough.—The system of police in towns corporate rested until 1835 on the common law as modified by the Statute of Winchester and local Acts (see CONSTABLE, Vol. III. p. 485). The first systematic attempt to constitute a police force was made in 1829 for the METROPOLITAN POLICE DISTRICT. Under the Municipal Corporations Act, 1835, a watch committee was established for each borough, which was given the appointment and control of the police therein; and this system was expressly saved on the establishment of county police in 1839 (2 & 3 Vict. c. 93, s. 24), and is still continued under Part IX. of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50.

The watch committee is appointed by the town council, and consists of the mayor and not over one-third of the council, acting by a majority and having a quorum of three. It appoints the borough constables, and can suspend or dismiss them and regulate their discipline and fix their salaries, subject to the approval of the council, and may give them additional duties in addition to these as police, including duties as FIRE POLICE (see 1856, c. 69, s. 7; 1882, c. 50, Part IX.), inspectors of common lodging-houses or explosives, or as to diseases of animals, weights and measures, dairies and cowsheds, food and drugs, etc. To them was added in 1893 (56 & 57 Vict. c. 10) a provision as to employing constables as firemen. The annual report of the inspectors of constabulary (Parl. Pap., 1907, R. 128) show the mode in which this power has been exercised.

Reports made by the police in discharge of any of their duties are privileged (*Andrews v. Nott Bower*, [1895] 1 Q. B. 888). Quarterly returns as to the borough force must be made to the Home Office (1882, c. 50, s. 192).

The provisions as to station houses, etc., have already been treated under LOCK-UPS.

The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, provides (s. 6) for the appointment of constables by town commissioners where constables were not appointed under the County Police Acts of 1839 and 1840. Since the latter Acts were made general and compulsory in 1856, no occasion arises for having a separate police force in a non-municipal urban district. Hove, the only such district which had such a force in 1898, is now a municipal borough. An urban district council if it needs extra police can apply for them under sec. 7 of the Act of 1847. Secs. 8-20 provide for the powers, duties, and discipline of constables appointed under that Act.

Boroughs, of whatever size, within the METROPOLITAN POLICE DISTRICT have no separate police force, *e.g.* Croydon, Richmond, and West Ham.

Under the County Police Act, 1839, c. 93, s. 24, the county justices were not to appoint police for boroughs and Quarter Sessions, boroughs were not liable to contribute to the county police rate. In the case of boroughs outside the Metropolitan Police district to which a new charter is granted under the Municipal Corporations Act, 1882, a new separate police force may not be established unless the borough contained 20,000 or more inhabitants at the date of the last census before the charter (1882, s. 215); and all boroughs which at the census of 1881 had a population under 10,000 were in 1889 amalgamated for police purposes with the county in which they were situate (1888, c. 41, s. 39 (1)), and the functions of the watch committee as to the police went to the county police authority, and the constables passed over to the county force (s. 118). These enactments apply even to counties of cities or towns.

A borough entitled to have a separate police force may contract with the police authority of the county in which it is situate or to which it adjoins for the establishment of a consolidated police force, on terms fixed by an Order in Council. The arrangement may be terminated by the sanction of a Secretary of State (1840, c. 88, ss. 14, 15; 1856, c. 69, ss. 5, 20). The consolidated force is governed by the chief constable of the county. See Parl. Pap., 1907, R. 128.

Many boroughs, including the county boroughs of Burton-on-Trent, West Bromwich, Bury, and Gloucester, have elected to be watched by

the county police, or to consolidate their forces with the county force (Parl. Pap., 1907, R. 128).

The condition of a borough police force may be the subject of Home Office inquiry (*e.g.* Manchester, 1898), and is annually reported on by the inspectors of constabulary (1856, c. 56, s. 15; Parl. Pap., 1907, R. 128). If the report is satisfactory, the Home Secretary certifies efficiency. If he refuses to do so, he states his grounds, and the borough forfeits to the Exchequer the amount certified as half the cost of pay and clothing of the force for the year (1856, c. 69, s. 16; 1888, c. 41, ss. 25, 34).

Borough constables on appointment make a declaration before a borough justice (1868, c. 72, s. 12; 1882, c. 50, s. 190); and when sworn in have not only in the borough but in the county of which it is part, and in any county or borough within a radius of seven miles from their own borough, all the powers, duties, liabilities, and privileges of a constable at common law or by statute for the districts named, and are subject to the lawful commands of any justice in any such district in which they are called on to act (1882, c. 50, s. 191).

They are also entitled to arrest disorderly persons or persons whom they have just cause to suspect of intending to commit felony (1882, c. 50, s. 193). See ARREST. Assault on or resistance to borough constables is punishable summarily (under sec. 195 of the Act of 1882, and also under sec. 20 of the Town Police Clauses Act, 1847, and sec. 12 of the Prevention of Crimes Act, 1871), as well as on indictment. See ASSAULT.

Borough constables may vote but not canvass at parliamentary or municipal elections (1856, c. 69, s. 9; 1887, c. 9; 1893, c. 6), but are not entitled to the franchise when living in cubicles in police barracks (*Barnett v. Hickmott*, [1895] 1 Q. B. 691). For neglect of duty they may be convicted summarily (1882, c. 50, s. 194), or may be suspended, fined, or reduced in rank by the watch committee (1859, c. 32, s. 26).

The salaries, wages, and allowances of the borough constables, rewards for activity, and allowances on retirement are regulated by sec. 140 and Sched. 5 of the Municipal Corporations Act, 1882, and the Home Office Order referred to under POLICE, COUNTY. The expense of the force is defrayed out of the borough fund, fed by the borough rate or a watch rate not exceeding 8d. in the £.

Where the force is efficient half the cost of pay and clothing is paid to the borough by the county treasurer out of the local taxation grant (1888, c. 41, ss. 24, 25). Where additional police have to be drafted into the borough on an emergency (under 1890, c. 45, s. 25) half their cost comes within this provision (*R. v. Yorkshire West Riding County Council*, [1895] 1 Q. B. 805).

Special constables are appointed for boroughs under sec. 196 of the Municipal Corporations Act, 1882 (c. 50), from among persons not legally exempt from the common law office of constable. The appointment is made annually in October by two or more justices having jurisdiction in the borough. They cannot be called on to act except under a justices' warrant reciting the insufficiency of the borough police force. They are entitled to remuneration if they act (Scheds. 4, 5).

The superannuation and pensioning of the borough police is regulated by the Police Acts, 1890 (c. 45), 1893 (c. 10), 1902 (c. 10) and 1906 (c. 7), and the contribution of the borough to the pension fund where the borough police are employed on fire brigade duty, is prescribed by General Order of the Home Secretary of December 19, 1893 (St. R. & O., Rev., 1904 ed. vol. x., tit. "Police," E, p. 7). To this fund are also carried deductions

and stoppages from pay and allowances for service of process, etc., and fees (1859, c. 32, s. 11; 1890, c. 45, ss. 15, 20, 21, 23, 36); a list of the scales of pension in force in 1891 is contained in Parl. Pap., 1891, c. 142.

The Act, 1890, provides for the payment of an annuity to a constable on his retirement after a number of years approved in diligent and faithful service, the extent of the allowance to be calculated on the amount of his annual pay at the date of his retirement. The approved service need not be continuous (*Garbutt v. Durham Joint Committee*, [1906] A. C. 291; 1906, c. 7, s. 2). The certificate of approved service must be given by order of the police authority. The chief officer of police can certify only as to the period of service (*ibid.*). It was held that where a divisional inspector of police resided with his family, rent free, at a police station, and had the free use of coal, gas, and water, that these could be treated as part of his pay for the purpose of calculating the amount of his annual pension. When a Watch Committee fixes the amount of a pension, and the constable being dissatisfied, appeals to Quarter Sessions, under sec. 11 of the Police Act, 1890, a case may be stated for the opinion of the King's Bench Division on a question of law (*Kydd v. Liverpool Watch Committee*, [1907] 2 K. B. 591, C. A.). A constable of the Metropolitan police on special duty in the Houses of Parliament is not entitled to have the extra shilling per day that he is paid for that service considered as part of his pay for the purpose of calculating his pension (*Upperton v. Ridley*, [1903] A. C. 281).

Where a pension is granted on the ground of incapacity to serve, the police authority may require the pensioner to attend for medical examination to see whether the incapacity to serve continues; and refusal to attend when attendance is *bonâ fide* required for, this purpose entitles the authority to require the pensioner to serve again, and if he does not to cancel his pension (*R. v. Leigh*, [1897] 1 Q. B. 132).

Police, City.—See METROPOLITAN POLICE DISTRICT.

Police, County.—The early history of county police is dealt with under the heads CONSTABLE and HEADBOROUGH.

In 1831 (1 & 2 Vict. c. 41) provision was made for the appointment and swearing in of persons (not legally exempt from serving the office of constables) by two or more justices for any district, having a separate commission of the peace, on information that disturbances existed or were apprehended (ss. 1, 2). Notice of appointment must be at once given to the Home Secretary, who also, on representations of need, can direct exempted persons to be sworn in (ss. 2, 3). The Act prescribes fully the duties and powers and pay of the special constables, and the mode of discontinuing their services (*R. v. Porter*, 1841, 9 Car. & P. 778). They can act outside the parishes in which they reside (5 & 6 Will. iv. c. 43). In 1838 (1 & 2 Vict. c. 80) provision was made for appointing and paying special constables to keep order among labourers employed in constructing railways, canals, and other public works. The expenses are payable by the undertakers, under order of the county treasurer, made after notice to the undertakers.

The present county police system was established under a series of Acts beginning in 1839 (2 & 3 Vict. c. 93), and going down to 1890.

The Acts at first were applied partially and tentatively, but have been made general and compulsory (19 & 20 Vict. c. 56, s. 1), and apply to all administrative counties created under the Local Government Act, 1888, excepting the county of London and metropolitan police district, but including the administrative subdivisions of counties at large, *e.g.* the Ridings of Yorkshire, the parts of Lincolnshire, the eastern and western divisions of Suffolk and Sussex, and the divisions of Cambridgeshire and Northamptonshire, and the new administrative county of the Isle of Wight. The non-municipal liberties of counties, which used to have separate police forces, *e.g.* Havering-atte-Bower and Ripon, were, in 1889, merged in the county for police purposes (2 & 3 Vict. c. 93, ss. 27, 28; 51 & 52 Vict. c. 41, s. 48).

The police authority in counties was, from 1840 till 1889, the justices in Quarter Sessions. It is now the standing joint committee appointed annually by the county council and the justices in equal numbers from each body (51 & 52 Vict. c. 41, s. 30).

The authority appoints a chief constable, and fixes the number of superintendents, officers, and men, by reference to the needs of the county, subject to the approval of the Home Secretary, and divides the county where necessary into police districts (*Ex parte Knowling*, 1865, 11 Jur. N. S. 443; *Ex parte Leicestershire C. C.*, [1891] 1 Q. B. 53), and fixes the number of constables for each district, subject to like approval. Where such districts are formed, the general expenditure on police is divided from the local expenditure (1840, c. 88, ss. 27, 28; 1856, c. 69, s. 4), and the former is collected by a general county rate, and the latter by a rate for the district in which it is incurred; *i.e.* when the local taxation grant does not cover the whole cost of police. Where such districts are not formed, the police are usually distributed with reference to the petty sessional divisions of the county under a superintendent for each division. Monthly returns are made to the police authority of the disposition and numbers of the force (3 & 4 Vict. c. 88, ss. 31, 32).

The discipline of the force is in the hands of the CHIEF CONSTABLE, subject to the approval by the police authority of the regulations framed by him. He appoints his subordinates and the petty constables, but is subject to rules for the government, pay, clothing, accoutrements, and necessities of the force made under sec. 3 of the Act of 1839 by the Home Secretary in 1886, which are printed in Statutory Rules and Orders, Revised, 1904 ed., vol. x. "Police," E, 1. These rules also state the qualifications of the chief and other constables. All persons employed in the police are exempt from service on the militia and on juries, and bound to devote themselves wholly to their police duties or such extra duties as may be lawfully imposed (1839, c. 93, s. 11; 1856, c. 69, s. 7; *R. v. Jarvis*, 1854, 3 El. & Bl. 640).

The county constables have all the common-law powers of constables, and all the statutory additions to these powers, with respect to the prevention of crime and the pursuit and arrest of offenders. Their powers as to ARREST and BAIL have already been treated under these heads.

The powers and duties of the police are the same as those under the Special Constables Act, 1831, *i.e.* for the whole county they have all the powers of common-law constables and also statutory powers, including those specified under the title ARREST.

Warrants of commitment as distinct from warrants of arrest are

directed generally to the constables of the force, and their execution is regulated by 1839, c. 88, s. 33.

Property which comes into the possession of the police is dealt with under the Police Property Act, 1897, 60 & 61 Vict. c. 30, and regulations made thereunder by the Home Secretary on February 14, 1898. See *Metropolitan Police Guide* (4th ed. 1906), 176.

Resignation without leave and neglect of duty are summarily punishable, as are refusal to deliver up accoutrements on discharge, personation of constables, and harbouring them in licensed premises when on duty (1839, c. 88, ss. 12-16).

Additional constables may be appointed at the request and cost of individuals, but subject to the orders of the chief constable (2 & 3 Vict. c. 93, s. 19), and discontinued on a calendar month's notice to the chief constable.

They must not canvass, but may vote at parliamentary or local government elections (1839, c. 93, s. 9; 1856, c. 69, s. 9; 1893, c. 6). They do not act within boroughs maintaining a separate police force, except where the county and borough forces are consolidated (1856, c. 69, s. 6).

Parts of a county inconveniently situate may be policed by the force of another county (1840, c. 88, s. 2), and provisions were made in 1858 (1859, c. 68) as to detached portions of counties, which are now for the most part spent or superseded by the Local Government Acts of 1888 and 1894.

So far as not covered by the local taxation grant, the cost of the force is defrayed by a police rate levied by the county council on the whole county, subject to the provisions already mentioned as to local police rate, and collected from the guardians of the poor (1844, c. 33); but it is not collected in parts of counties lying within the metropolitan police district nor in any Quarter Sessions borough subject to the Municipal Corporations Acts which maintains a separate police force (1839, c. 93, s. 24; 1840, c. 88, ss. 3, 14, 15); and see POLICE, BOROUGH.

The basis of the rate is the same as for the county rate. The expense to be included is not merely pay or salary and accoutrements, horses, etc., but also reasonable allowances for extraordinary expenses necessarily incurred in apprehending offenders or executing police duties. An account of allowances made by the justices in each division is kept and remitted to the county treasurer for proper audit (1839, c. 93, s. 18; 1840, c. 88, s. 18).

The efficiency of the force is ensured by annual inspection and report by inspectors of police appointed by the Crown (1856, c. 69, s. 15), on which the Home Secretary grants or withholds, for reasons stated by him, his certificate of efficiency. If it is withheld, the county forfeits to the Exchequer the amount certified as half the cost of pay and clothing of the force for the year (Parl. Pap., 1907, R. 128, p. 221).

The pensions and superannuation of the county police are regulated under the Police Acts of 1890 and 1906, and, except as to fire-brigade service, are the same as in boroughs (see POLICE, BOROUGH). There are special provisions as to Lincolnshire (1865, c. 35, s. 7; 1888, c. 9; 1890, c. 45, s. 30 (4)).

Police Courts.

TABLE OF CONTENTS.

ESTABLISHMENT	198	PROCESS	205
JURISDICTION	200	ROUTINE	206
POWERS	203		

The words "Police Court" here mean petty sessions of the peace held in the metropolis and certain large towns by barristers specially appointed and paid as magistrates.

"Petty sessions" held by the unpaid magistracy are the subject of another article (p. 108).

ESTABLISHMENT.—The first establishment of Police Courts was in London. The City of London being under the jurisdiction of the Lord Mayor and aldermen, who exercise the office of justices of the peace under charter of Edward IV., provision was made in 27 Eliz. c. 5 (not printed) for the good government of Westminster. By 29 Geo. II. c. 25, the dean or high steward was enabled at a Court leet yearly to appoint eighty residents to be constables, and also a high constable, and an "annoyance jury" to present annoyances and other offences. By 14 Geo. III. c. 90, better regulations for lighting and watching Westminster and parts adjacent were made. In 1792 the Crown was empowered by 32 Geo. III. c. 53 to cause seven public offices to be established in specified metropolitan parishes, and appoint at each office three fit persons, being justices for Middlesex and Surrey, to execute the office of justice of the peace, together with such other justices as might think proper to attend (s. 1); one or more of the appointed justices to attend at each public office every day during prescribed hours. No fees were to be taken afterwards by any other justices within the limits of the Bills of Mortality or certain specified parishes under a penalty; except for licensing alehouses, or at Bow Street, or for enforcing payment of taxes or assessments, or for offences cognisable before a justice by virtue of any statute for the regulation of the parish (s. 3), fees and fines were to be paid to a receiver (ss. 4, 5) appointed by the Crown. Salaries were to be paid to the justices, clerks, and peace officers employed at the offices. The justices might employ at each office six constables. The Act, being temporary, was continued by 33 Geo. III. c. 75. These Police Acts were repealed, and, in substance, re-enacted by 42 Geo. III. c. 76, which raised the salaries of the magistrates, and the wages of the constables employed at each Court. The police were, however, insufficient. One of the magistrates writing in 1797 on the subject said: "At present the system of the nightly watch is without energy, disjointed, and governed by almost as many different Acts of Parliament as there are parishes, hamlets, liberties, and precincts within the Bills of Mortality." He estimated the number of metropolitan watchmen outside the city to be 1241 (*The Police of the Metropolis*, by P. Colquhoun, 5th ed., London, 1797, at p. 100). He also directed attention to the want of police to check offences then rife on the Thames; and the 39 & 40 Geo. III. c. 88 was passed, under which a police office was established at Wapping New Stairs, and three justices were appointed at a salary to hear and determine such offences. Seven constables might be employed at that office, and many special provisions applicable to the river were made.

10 Geo. IV. c. 44 substituted a "new and more efficient system of police," enacting that the Crown might "cause a new police office to be

established" in the city of Westminster, and appoint two fit persons as justices of Middlesex, Surrey, Hertford, Essex, and Kent, although without qualification by estate, at a salary (ss. 1-3). Parishes named are constituted the METROPOLITAN POLICE DISTRICT, and a "sufficient number of fit and able men" shall from time to time be appointed as a police force for the whole, sworn to act as constables and to obey the lawful commands of the said justices (s. 4), who may make regulations relative to the force, and suspend or dismiss men remiss or negligent (s. 5). The new police were to supersede the watchmen, and take over their arms and watch-boxes (s. 19). A receiver appointed by the Crown (s. 10) at a salary has to receive all sums of money applicable to the purposes of the Act, to pay the police (s. 12), and contract for the purchase or renting of land or buildings (ss. 16, 17). Penalties imposed under the Act are to be paid to him (s. 37), and also the proceeds of a police rate, which (by s. 23) justices may command the overseers of the poor to levy and collect as a poor-rate (ss. 24, 25, 26, 30, 31, 32), subject to appeal (s. 33). He must give security (s. 10) and furnish accounts (s. 11) to be annually laid before Parliament (s. 29). Provisions are made in case of the removal or death of the receiver as to the recovery of such moneys due from him (s. 14), or from his representatives (s. 15).

2 & 3 Vict. c. 47, after reciting that the system of police established under 10 Geo. IV. c. 44 had been found "very efficient," and might be yet further improved, and repealing the 29 Geo. II. c. 25, enables additions to be made to the police district by Order in Council (s. 2), and provides that the justices appointed under that Act may be appointed justices for Buckinghamshire and Berkshire, and be styled "The Commissioners of Police of the Metropolis" (s. 4); and the constables of the metropolitan force shall have the powers of a constable in those counties and on the river Thames within or adjoining Middlesex, Surrey, Berkshire, Essex, and Kent, and the City of London, and the waters, docks, and landing-places adjacent (s. 5). Provisions are made for payment out of the Consolidated Fund of the increased charge of the establishment (s. 6), constables being sworn to act within the Royal palaces and ten miles thereof (s. 7), additional constables at the charge of individuals (s. 8), a statement of the numbers of the force being laid annually before Parliament (s. 9), their freedom from tolls (s. 10), the attendance of a sufficient number at the Police Courts and other criminal Courts to execute summonses and warrants (s. 11), all summonses and warrants issued within the district being executed by a constable of the force, and by none other (s. 12), the name of the constable to execute a warrant being indorsed by his superior officer (s. 13). Penalties or imprisonment are prescribed for neglect or violation of duty by constables (s. 14). They may not resign without leave or notice (s. 15), and must on ceasing to hold office deliver up clothing and accoutrements, or be liable to imprisonment (s. 16). Unlawful possession thereof or assumption of the dress or character of a constable by a person not a constable is made an offence (s. 17). Every person assaulting or resisting or aiding or inciting another to assault or resist a police officer in the execution of his duty, is made liable to a fine or imprisonment (s. 18); and certain special powers of arrest, entry, inspection, search, seizure, and detainer, and of regulating traffic, and taking bail, are given to the police (ss. 28, 33, 34, 35, 39, 46, 47, 48, 51, 52, 61, 62, 63, 64, 67, 68, 69, 70, 71, 72). The Act also creates various offences for which penalties and punishment are prescribed. One commissioner of police only and two assistant commissioners may now be appointed under the Police Acts, 19 & 20 Vict. c. 2.

The Courts having been established with an efficient police force, an Act "for regulating" them was passed in the same session of Parliament (2 & 3 Vict. c. 71), and another Act "for better defining the powers of justices within the metropolitan police district" in the following year (3 & 4 Vict. c. 84).

Additional Courts have since from time to time been established by Orders in Privy Council under these Acts which, as amended and altered by subsequent legislation, still govern the Metropolitan Police Courts.

The special provisions applicable to those Courts and their present state may be thus summarised:—

2 & 3 Vict. c. 71 (The Met. Pol. Courts Act, 1839) provides for the continuance of the establishment (s. 1), and that the Crown, with the advice of the Privy Council, may alter the number of the Courts and magistrates, and by 3 & 4 Vict. c. 84 constitute Police Court Divisions and establish a Police Court for each, provided that there shall not at any time be more than twenty-seven magistrates (ss. 2, 4, 5).

There are now fourteen Courts and twenty-five magistrates, viz.—Bow Street, with the chief magistrate and two others; the Westminster, Marlborough Street, Marylebone, Clerkenwell, Lambeth, Old Street, Thames, Tower Bridge, and West London Courts, each with two magistrates; Greenwich and Woolwich, with two magistrates between them; and the North London and South-Western Courts, each with one magistrate only, who is relieved by the assistance of magistrates from the other Courts when not on duty at their own.

The boundary of each district is defined in the Acts and in maps kept at the Courts (Archibald, *Met. Police Guide*, 1891, p. 71).

Vacancies are supplied by the Crown appointing barristers who have either practised as such during at least seven years then last past, or have practised as barristers for four years then last past, having previously practised as special pleaders for three years (2 & 3 Vict. c. 71, s. 3), or are stipendiary magistrates in the provinces (21 & 22 Vict. c. 73, s. 14). Clerks, ushers, doorkeepers, messengers, and probation officers are appointed for the Courts, and dismissed at pleasure by a Secretary of State (2 & 3 Vict. c. 71, s. 5; 7 Edw. VII. c. 17, s. 3). Salaries of the magistrates and receiver, prescribed by sec. 9, are by 38 Vict. c. 3, fixed at £1800 for the chief magistrate, and at £1500 each for the other magistrates. These salaries are paid out of the Consolidated Fund; the expenses of and incidental to the Courts, except the salaries and superannuation allowances of the magistrates, are now paid out of the fund applicable for defraying the expenses of the metropolitan police (60 & 61 Vict. c. 26, s. 1).

The Courts are held on every day, except Sunday, Christmas Day, Good Friday, or any day appointed for a public fast or thanksgiving, and at such other times as urgent necessity may require or shall be directed by a Secretary of State (2 & 3 Vict. c. 71, s. 12), who may, by order, close the Courts on any day appointed under sec. 4 of the Bank Holidays Act, 1871, to be a Bank Holiday (60 Vict. c. 14; Met. Pol. Act, 1897).

The time prescribed for the attendance of a magistrate is from 10 A.M. to 5 P.M. at each Court, except those of Greenwich and Woolwich, and from 10 A.M. to 1 P.M. at Greenwich, and from 2 P.M. to 5 P.M. at Woolwich (2 & 3 Vict. c. 71, s. 12).

JURISDICTION.—The magistrates have jurisdiction over the districts

of each other (s. 13), and one magistrate may do any act directed to be done by more than one justice, but may not act at a special or petty sessions of all the justices acting in the division, or at Quarter Sessions (s. 14). Every summons or warrant issued by any justice of the home counties aforesaid other than a metropolitan police magistrate requiring any person residing within the metropolitan police district to appear at any place without the district to answer any information or complaint touching any matter arising within the district is void, except for enforcing payment of rates and taxes (s. 18), and except as to anything arising within a part of the district not assigned to any of the Police Courts (21 & 22 Vict. c. 73, s. 6); and no other justice nor his clerk may take any fees within the police district except at General or Quarter Sessions or Licensing Sessions or meetings of justices as to poor-law settlements or removals, or in respect of business which must be transacted at such special or petty sessions or for enforcing rates and taxes (s. 42). The fees contained in a schedule (A) to 2 & 3 Vict. c. 71 may be taken at the Police Court and may be enforced by distress (s. 43). Those fees are, for a summons, 2s.; warrant, 2s.; backing warrant, 1s.; recognisance to appear, 2s. 6d.; and to keep the peace, 2s.; supersedeas, 3s.; distress warrant, 3s.; declaration, except those relating to lost duplicates of articles under 20s., and except those made for the use of public offices or departments or for charitable purposes, 1s. (Sched. A). An account of all fees, penalties, and forfeitures must be kept, and delivered to the receiver, and the amount of all such sums paid to him to be applied towards the expenses of the Courts, except fines on drunken persons, constables for misconduct, or for assaults on police constables, which must be applied for the benefit of "The Police Superannuation Fund," and except fees for the execution of summonses and warrants (s. 46), even when by subsequent Acts such penalties or forfeitures are made payable to any body corporate or persons save the informer or any party aggrieved, except such as are sued for by direction of the Commissioners of Customs (s. 47). This section is not repealed by a later general Act providing that half of any penalty under it should be paid to the overseers (*Wray v. Ellis*, 1859, 1 El. & El. 276). But penalties recovered by officials under the Margarine Act, 50 & 51 Vict. c. 29, must be paid to them and not to the Receiver of Police (*Reg. v. Titterton*, [1895] 2 Q. B. 61).

The Public Offices Fees Act, 1879, applies to all fees payable at the Metropolitan Police Courts (60 & 61 Vict. c. 26, s. 7, amended by 61 & 62 Vict. c. 31).

The exclusive jurisdiction of metropolitan police magistrates is limited by 3 & 4 Vict. c. 84 to the seven Police Courts then already established; elsewhere in London two justices sitting together at petty sessions have the powers of one police magistrate, but at every Police Court at which the regular attendance of a police magistrate shall have been ordered, he, while present in such Court, shall act as the sole magistrate thereof (s. 6).

Penalties recovered before two justices so sitting together do not, however, go to the receiver as if they were one police magistrate under sec. 6 (*Receiver for Met. Pol. District v. Bell*, 1872, L. R. 7 Q. B. 433).

The distinction between the original and the later Police Courts as to exclusive jurisdiction is defined in the *Met. Police Guide*, p. 13.

Of the Metropolitan Police Courts the Bow Street Police Court alone

has jurisdiction in extradition cases (33 & 34 Vict. c. 52, s. 26), but any metropolitan police magistrate or stipendiary magistrate may, by order of a Secretary of State, hear such cases when the removal of the accused to Bow Street would be prejudicial to his health (58 & 59 Vict. c. 33). See EXTRADITION, Vol. V. p. 638.

The police magistrates must hold quarterly meetings to report and consider their proceedings (2 & 3 Vict. c. 71, s. 15). The Secretary of State may make rules for regulating the business of the Courts, a copy being laid before both Houses of Parliament (s. 16).

The precedent of appointing stipendiary magistrates in London was soon followed by an Act (2 & 3 Vict. c. 15) enabling one to be appointed for a particular group of populous towns in the country. He was to have the power of two justices, but might sit alone or with other justices; his jurisdiction was not exclusive, nor was he given any such special jurisdiction as that of the metropolitan magistrates. Fines and fees were to be paid over to a local treasurer in aid of a fund to be raised by a police rate, out of which the salaries of the establishment were to be paid. Public Acts (7 & 8 Vict. c. 30; 9 & 10 Vict. c. 65) of a like kind for two other provincial towns followed; in 1858 an Act gave to a stipendiary magistrate power to do alone all acts authorised to be done by two justices (21 & 22 Vict. c. 73); in 1863 an Act of general application (26 & 27 Vict. c. 97), enabling cities, towns, and boroughs of 25,000 inhabitants and upwards to obtain a stipendiary magistrate, was passed; and by 45 & 46 Vict. c. 50, the Municipal Corporations Act, 1882, s. 161, if the council of a borough desire a stipendiary magistrate for the borough, they may present a petition to the Secretary of State, and thereupon the Crown may appoint a barrister of seven years' standing (s. 2) to hold office during the pleasure of the Crown (s. 3), at a yearly salary not exceeding, except with consent of the council of the borough, that mentioned in the petition, as the Crown shall direct (s. 5).

Under such local and general Acts stipendiary magistrates have been appointed and hold Courts at Birmingham, Bradford, Cardiff, Chatham, Sheerness, Kingston-on-Hull, Leeds, Liverpool, Manchester City, Manchester Division, Merthyr Tydvil, Middlesborough, Pontypridd, Salford Borough, Sheffield, the Staffordshire Potteries, West Ham, Wolverhampton, East Ham, and Grimsby. Stipendiary magistrates have jurisdiction as to the extradition of fugitive criminals for a crime on a vessel on the high seas which comes into a port of the United Kingdom (33 & 34 Vict. c. 52, s. 16).

The Metropolitan Police Acts perhaps suggested, or at least foreshadowed, some of the provisions in the Summary Jurisdiction Act, 1848, 11 & 12 Vict. cc. 42 and 43), regulating the procedure of justices at petty sessions, but are not affected thereby (11 & 12 Vict. c. 42, s. 29, and c. 43, s. 33), although subject to the Summary Jurisdiction Acts, 1879 and 1884 (42 & 43 Vict. c. 49, s. 54; 47 & 48 Vict. c. 43).

The jurisdiction of police magistrates to investigate charges of indictable offences, and the procedure in such cases, are the same as those of other petty sessions, and governed by the Summary Jurisdiction Act, 1848, 11 & 12 Vict. c. 42. Such magistrates have also the jurisdiction of ordinary petty sessions in all cases which may be dealt with summarily.

Metropolitan police magistrates have, moreover, under the Metropolitan Police Court Acts and the numerous Acts and by-laws regu-

lating London, jurisdiction over offences created by those provisions, and special powers, functions, and procedure in various cases—criminal, quasi-criminal, and civil.

POWERS.—The Metropolitan Police Act, 2 & 3 Vict. c. 47, contains many provisions for the detection and suppression of crime, the maintenance of order, and the prevention of nuisance in the metropolis. The offences on the Thames of cutting the tackle of vessels with intent to steal (s. 27), letting fall articles from vessels into the river or boats to prevent seizure or discovery (s. 28), framing false bills of parcels (s. 29), possessing instruments for unlawfully carrying away liquors (s. 30), piercing casks and opening packages of liquors to steal them (s. 31), or to spill or drop the contents (s. 32), are made misdemeanors. Penalties are prescribed for having or firing loaded guns on vessels in the night (s. 36), and for heating combustible materials on vessels in the Thames between Westminster and Blackwall (s. 37); for keeping fairs open between certain hours (s. 38), for breaches of regulations as to refreshment houses (s. 44), cookshops, etc. (s. 45), for keeping unlicensed theatres (s. 46) or places for bear-baiting, or fighting cocks, dogs, etc. (s. 47), and as to pawnbrokers, receiving pledges from persons under sixteen (s. 50). Every person is, by sec. 54, made liable to a penalty of not more than forty shillings, who shall, in any thoroughfare or public place, commit any of the following offences, viz.—(1) Show horses or caravans containing any show, or feed, farry, dress, or exercise any horse or clean or repair carriages, except in cases of accident; (2) loose any horse or cattle, or any unmuzzled ferocious dog; (3) by negligence or ill-usage in driving cattle cause mischief; (4) having care of any cart or carriage ride on the shafts or horse without holding the reins, or be at such a distance as not to have control; (5) ride or drive furiously or to the common danger; (6) cause vehicles to stand longer than necessary for loading or unloading, or cause an obstruction (see *Dunn v. Holt*, 1904, 73 L. J. K. B. 341); (7) ride or drive on the footway; (8) roll or carry any cask, etc., on any footway, except to load or unload carts, or cross it; (9) wilfully disregard traffic regulations; (10) without consent affix bills on buildings, etc., or deface or damage them or trees or seats in public places; (11) being a prostitute, loiter for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers; (12) sell or utter profanity, indecency, or obscenity to the annoyance of the inhabitants or passengers; (13) use threatening, abusive, or insulting words or behaviour whereby a breach of peace may be occasioned; (14) blow horns or use any other noisy instrument to call persons together, or announce any entertainment, or sell articles, or obtain money or alms; (15) wantonly discharge any firearm or missile to the damage or danger of any person, or make any bonfire, or set fire to any firework; (16) wilfully and wantonly disturb any inhabitant by ringing or knocking at any door without lawful excuse, or wilfully and unlawfully extinguish any lamp; (17) fly any kite or play at any game to the annoyance of inhabitants or passengers, or make or use any slide on ice or snow to the common danger.

The discharge of firearms of greater calibre than a common fowling-piece within three hundred yards of any dwelling-house, to the annoyance of any inhabitant thereof, is prohibited in sec. 55, and carts drawn by dogs in sec. 56. By sec. 58 every person found drunk in any public thoroughfare and guilty of riotous or indecent behaviour, and also every person guilty of any violent or indecent behaviour in any police station

house is liable to a penalty of not more than forty shillings, or may be committed for not more than seven days. Every person riding on a carriage without the consent of the owner or driver is liable to a penalty of five shillings, or, if a child under twelve years, may be detained and delivered to its parents (s. 59). A penalty of not more than forty shillings is imposed by sec. 60 on every person preparing cask, casks, timber, stone, or lime in a thoroughfare (1); laying coals and other materials in any thoroughfare except building materials placed or enclosed so as to prevent mischief to passengers (2); beating carpets or mats (except door-mats before 8 A.M.), or throwing dust or rubbish in any thoroughfare, or throwing any such thing into any sewer, pipe, well, watercourse, or reservoir (3); keeping swine near any street (5); exposing things for sale in any park or public garden without consent, or on or overhanging a carriage on footway or outside a shop, or setting up a projection from a building so as to cause annoyance or obstruction in any thoroughfare (7); and leaving cellars, areas, or pits adjoining any thoroughfare unfenced, uncovered, or unlighted (8).

Magistrates have jurisdiction as to fairs holden without lawful authority or beyond the lawful period (s. 39), and as to gaming houses (s. 48); and by 2 & 3 Vict. c. 71 may order that goods stolen or unlawfully obtained (s. 27), or unlawfully pawned (s. 28) be delivered up to the owner by brokers or dealers in second-hand property having possession of them, or by 60 & 61 Vict. c. 30, when in the hands of the police. "Goods" in 2 & 3 Vict. c. 71, s. 27, may include money if the holder has been formerly charged with having fraudulently obtained it (*R. v. D'Eyncourt*, 1888, 21 Q. B. D. 109). The magistrate may also order goods not exceeding £15 in value, which are detained without just cause or subject to a lien, to be delivered to the owner, either absolutely or upon tender of the amount appearing to be due or upon performance of the act for which the goods are held as security (s. 40); and the word "goods" will include a dog (*R. v. Slade*, 1888, 21 Q. B. D. 433). Jurisdiction is given to settle disputes as to wages up to £5 for labour on the Thames, docks, and places adjacent (s. 37), to order compensation up to £15 for wilful or malicious damage by tenants (s. 38), to deal summarily with cases of oppressive distress, when the annual rent does not exceed £15, by ordering the distress, if not sold, to be returned to the tenant on payment of the rent due, or, if sold, payment of the value after deducting the rent (s. 39), and to order the cleansing, at the expense of the occupier, of houses certified by two guardians of the poor and the medical officer of the parish to be filthy (s. 41).

A metropolitan police magistrate has also power to—

(a) Remand any person for further examination, or suffer to go at large any person who shall be charged before him with any felony or misdemeanor upon his personal recognisance (with or without sureties) conditioned for his appearance before a magistrate or to take his trial, and the magistrate may from time to time enlarge such recognisance (2 & 3 Vict. c. 71, s. 36; 3 & 4 Vict. c. 84, s. 9);

(b) Mitigate penalties or terms of imprisonment, except under Revenue Acts, 2 & 3 Vict. c. 71, s. 35, or the Militia Acts, 45 & 46 Vict. c. 49, s. 42;

(c) Lessen the share of informers (2 & 3 Vict. c. 71, s. 34; *Hawke v. Mackenzie*, [1902] 2 K. B. 234);

(d) Fine informers compounding informations for an offence by which

they were not personally aggrieved (s. 33), or persons obtaining money or rewards by threatening informations or complaints for misdemeanors (3 & 4 Vict. c. 84, s. 11);

(e) Award amounts up to £5 for frivolous charges (2 & 3 Vict. c. 71, s. 32);

(f) Award costs to be paid to or by either of the parties to a charge or complaint (s. 31);

(g) Issue search warrants for goods stolen or unlawfully obtained (s. 25).

(h) Examine receivers, pretended purchasers, and persons having had or possessing such goods, and fine or imprison those guilty of unlawful possession of them (s. 26);

(i) Fine to £5 or imprison for two months any person having or conveying in streets or public places anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give a satisfactory account how he came by the same (2 & 3 Vict. c. 47, s. 66; c. 71, s. 24; *Hadley v. Perks*, 1866, L. R. 1 Q. B. 444; 35 L. J. M. C. 277).

The magistrate may summarily convict any person charged with any offence against 2 & 3 Vict. c. 47, on the oath of one or more witnesses, or on his own confession (s. 76), and in every case of a penalty under the Act and non-payment, the offender may be committed to gaol for not more than one calendar month where the sum does not exceed £5, the imprisonment to cease on payment of the sum due (s. 77), and this applies even to the provision in 27 & 28 Vict. c. 55 as to street musicians, which repeals and is substituted for sec. 57 of the Police Act (*R. v. Hopkins*, [1893] 1 Q. B. 621).

For every misdemeanor or other offence against 2 & 3 Vict. c. 47, for which no special penalty is thereinbefore provided, the offender is liable at the discretion of the convicting magistrate either to a penalty of not more than £5 or to be imprisoned for any time not more than one calendar month (s. 73).

PROCESS.—Persons are brought before the magistrate—(1) without process, (2) by process.

1. *Without Process*.—In addition to the general powers of arrest possessed by ordinary constables, a metropolitan police officer may, under the Metropolitan Police Acts, arrest “all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs” (10 Geo. IV. c. 44, s. 7), or of having committed or being about to commit any felony, misdemeanor, or breach of the peace, or whom he shall find between sunset and 8 A.M. lying or loitering in any highway, yard, or other place, and not giving a satisfactory account of themselves (2 & 3 Vict. c. 47, s. 64); persons suspected of felonies in ships and vessels in the Thames docks or creeks (s. 34); found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction, by virtue of this Act, or any person reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained (s. 66); found in a gaming house (s. 48); doing acts punishable under sec. 54 with a 40s. fine (various street nuisances) in his view (s. 54); by an offence forbidden in the Act, doing damage and not making amends on demand (s. 62); or any person offending against the Act within his view, and whose name and residence shall be unknown to the constable and cannot be ascertained by him (s. 63); or charged with an aggravated assault

when the constable has good reason to believe that such assault has been committed, although not within his view, and that by reason of the recent commission of the offence a warrant would not have been obtained (s. 65).

In some of the cases aforesaid the offender may be arrested by the owner of property on or with respect to which the offence shall be committed, or by his servant or any person authorised by him, and may be detained until he can be delivered into the custody of a constable (s. 66).

Every person taken into custody by any metropolitan police constable without warrant, except persons detained for the mere purpose of ascertaining their name or residence, must be forthwith delivered into custody at the nearest station house, to be brought before a magistrate, or to give bail to appear before him (s. 69).

2. *By Process.*—By summons in matters which may be determined summarily, and on non-appearance to the summons, and in criminal cases by warrant (2 & 3 Vict. c. 71, s. 19).

Such summons to be served on the party, or his wife, servant, or some adult inmate of his family at his usual place of abode (s. 20). Or the magistrate may, without issuing any summons, issue his warrant for the apprehension of any person charged with any offence cognisable before him whenever good grounds for so doing shall be stated on oath before him (s. 21). A warrant in respect of a matter arising within the metropolitan police district may be executed out of it, and does not require indorsement by another justice (s. 17). The attendance of witnesses may be enforced by summons, or in default of appearance, by warrant, and any person refusing to give evidence may be committed for fourteen days, or until submission to be examined (s. 22).

ROUTINE.—The staff of a metropolitan Police Court (s. 2) is composed of a chief clerk, second clerk, assistant clerk, usher, messenger, courtkeeper, doorkeeper, gaoler, assistant gaoler, warrant officers, and probation officers. The buildings containing the court, offices, and cells are vested in the receiver. The courtkeeper has charge of them. The daily routine is that before 10 A.M. covered vans, having compartments each capable of holding one prisoner, convey prisoners in custody from the gaols and police stations to the Court, where they are placed in cells, and their names and the particulars of the charges against them, contained in charge-sheets made out at the police stations, are entered in a register. The magistrate takes his seat in Court, and, before it is opened to the general public, persons wishing to make applications to him are admitted to do so. These applications are chiefly for a warrant or summons in respect of offences, but from the original institution of these Courts, it has been usual for the poor to ask and have advice of the magistrate in matters which, when stated, frequently prove to be beyond his jurisdiction. If he grants process, the applicant goes into an office, where particulars of the complaint are entered, and the fee is paid for the warrant or summons. The fee is often remitted to indigent persons. Applications by landlords of tenements, held at a rental not exceeding £20 a year, against tenants whose tenancy has been determined, and who have had notice to appear, and by licensed persons for temporary transfers of licences are next entertained.

The Court, attended by an inspector of police and several constables to keep order, is then opened to the general public, and the charges which have been entered in the magistrate's register are heard. Those

against children are first disposed of, and then the lighter charges of drunkenness and disorderly conduct, which involve the attendance of many constables as witnesses who have been on night duty, are dealt with. At most of the metropolitan Courts these charges are numerous, often exceeding fifty, and sometimes a hundred. If the offenders are not known to have been previously convicted, they are frequently discharged with a caution against repeating the offence. Charges of violent assault, for which the accused has been apprehended, come, as a rule, next in order, and then indictable crimes and misdemeanors. Cases arising on summons are generally heard in the afternoon, the defendants being summoned to attend at 2 P.M. The procedure in Court is mainly that prescribed by the Summary Jurisdiction Acts and general law, and used at all petty sessions.

Persons sentenced to imprisonment, committed for trial, or remanded in custody, are removed to the cells, and taken thence in the police vans to gaol. Children, if remanded, are sent to a remand home.

There is an appeal from metropolitan police magistrates to Quarter Sessions in every case of summary orders or convictions in which the sum or penalty adjudged is more than £3, or the penalty or imprisonment more than one calendar month (2 & 3 Vict. c. 7, s. 50).

Police, Metropolis.—The common-law system of police was superseded in 1829, for the METROPOLITAN POLICE DISTRICT, by 10 Geo. IV. c. 44, after previous experiments establishing a river police, a horse patrol, and the officers known as Bow Street runners, in addition to the watchmen maintained by the metropolitan parishes under Local Improvement Acts. (As to the present force, see Parl. Pap., 1907, c. 3771.)

The nature of the system has been already dealt with under METROPOLITAN POLICE DISTRICT, and the many statutes affecting the area and its police are collected in the official *Metropolitan Police Guide* (4th ed., by Roberts, 1906).

Police, Parish.—The Lighting and Watching Act, 1833, 3 & 4 Will. IV. c. 90, empowered parishes adopting it to employ constables and watchmen and to pay them out of a parish rate, and many local Acts existed with like objects. The County Police Act, 1839, 2 & 3 Vict. c. 93, s. 29, puts an end to the right to levy parochial police rates for any parish after the chief constable of the county has given notice that he is ready to undertake the policing of the parish, and the appliances and accoutrements provided by the parish pass to the county; but the parish may apply to the chief constable for additional police, and defray their cost out of a rate made under the Act of 1833, or the local Act. Provision is made for parishes and towns situate in more than one county.

Under the Parish Constables Act, 1842, 5 & 6 Vict. c. 109, justices or special sessions were empowered to appoint parish constables, who are entitled to act in the whole county, but not bound to act outside their parish. The Act was in 1844 (7 & 8 Vict. c. 52) extended to every liberty in England having a separate commission of the peace, and not being a "municipal borough."

Under the Parish Constables Act, 1872, 35 & 36 Vict. c. 92, appointment of parish constables is to be made only when the Quarter Sessions of the county within which the parish is resolve that it is necessary;

and under the Act the councils of rural parishes (as successors to the parish vestries) are entitled to apply to justices for appointment of paid parish constables.

When the County Police Act, 1839, 2 & 3 Vict. c. 93, s. 25, came into force in any non-municipal portion of a county, all power to appoint and pay and make rates for paying constables in any hundred, township, parish, or place came to an end, except as to high constables (see **CHIEF CONSTABLE**), special constables under the Act of 1831 (see **POLICE, COUNTY**), and parochial constables; but the change does not prevent the appointment of a constable to hold an election where necessary.

As to parishes or boroughs, see **POLICE, BOROUGH**.

Police Supervision.—Under the Prevention of Crimes Act, 1871, a Court before whom any person is convicted of certain crimes after a **PREVIOUS CONVICTION** of any such crime may, by order, subject such person to police supervision for not over seven years after the expiration of the sentence imposed (34 & 35 Vict. c. 112, ss. 7, 20). Convicts at large on licence are likewise subject to such supervision. Persons subject to supervision have to report their residence to the chief officer of police in the district where they reside, and to report change of residence (42 & 43 Vict. c. 55, s. 2; 54 & 55 Vict. c. 69, s. 4). This condition may be remitted (54 & 55 Vict. c. 69, s. 4 (2)), but breach of the Act, if not explained or excused, exposes the supervisee to twelve months' imprisonment on summary conviction (54 & 55 Vict. c. 69, s. 4 (1)), subject to his right to elect to be tried by a jury (42 & 43 Vict. c. 49, s. 17). As to arrest, see 54 & 55 Vict. c. 69, s. 2.

Policy of Insurance.—See **ACCIDENT INSURANCE**; **BURGLARY INSURANCE**; **FIRE INSURANCE**; **LIFE INSURANCE**; **MARINE INSURANCE**.

Political Offences.—There has been considerable controversy as to the meaning of the term "political offence" from two points of view, municipal and international.

Municipal.—Where an offence has been committed, not from motives of private spite or interest, but in order to change the legislative or executive Government in the country, it is frequently contended that the offence is political, and that persons convicted of it should not be treated as ordinary offenders, and should be pardoned or amnestied on the earliest opportunity. The offences to which this contention applies are those described as against public order, namely, treason, treason-felony, and sedition, or interference with the executive or legislature by unlawful assemblies intended to defy or overawe either, or riotous protests against the law; and, in fact, all acts directed to obtain by unlawful means a change in the law or general Government of the realm. There is no statutory recognition of any of these offences as political, unless it be sedition and seditious libel; as to which the law directs that persons convicted thereof shall be treated as first-class misdemeanants (40 & 41 Vict. c. 21, ss. 40, 41), and the controversy may be described as of a parliamentary rather than of a legal character.

International.—It is usual, if not invariable, to except from treaties of extradition "offences of a political character." What should be taken as excluded in this description has been much discussed by continental jurists (see 18 Clunet, 766). In England the subject seems

to have been dealt with only by Sir James Stephen (*Hist. Crim. Law*, vol. ii. p. 70), and by the judges on application for *habeas corpus* under the Extradition Act. The decisions are dealt with under EXTRADITION

Poll ; Polling.—See ELECTIONS.

Polls, Challenge to the.—See JURY.

Polygamy.—See MARRIAGE.

Pond.—A pond is a small area of land covered with water, usually brought there artificially, and usually having no stream running out of it. Many ponds have been formed for watering cattle, or storing fish with a view to consumption, or storing water for mills. They are not, as a general rule, subject to any public rights of fishing.

Damage to the dams, flood-gates, or sluices of a fish-pond, with intent to take fish, or poisoning the waters with like intent, or destroying the flood-gates or dam of a mill-pond, is punishable under 24 & 25 Vict. c. 97, s. 32; and minor damage to ponds appears to be covered by sec. 52 of the same Act.

Pontage.—See HIGHWAYS; TRINODA NECESSITAS.

Poor Kindred ; Poor Relations.—See WILL, *Judicial Glossary*.

Poor Law Union.—This phrase is defined by sec. 16 of the Interpretation Act, 1889, 52 & 53 Vict. 63, to mean “any parish or union of parishes for which there is a separate board of guardians.” See GUARDIANS OF THE POOR, Vol. VI. p. 449.

Poor ; Poor Law.

TABLE OF CONTENTS.

HISTORICAL INTRODUCTION . . .	210	Wilful Neglect to Maintain . . .	228
AUTHORITIES AND OFFICERS FOR THE ADMINISTRATION OF THE POOR LAW	213	Desertion	230
The Local Government Board . . .	213	The Workhouse	231
Poor Law Inspectors	215	Visiting Committee	232
District Auditors	216	In-door Relief	233
(a) Duties	216	(a) Control and Management . . .	234
(b) Surcharging and Appeals . . .	216	(b) Food Regulations	239
Guardians of the Poor	218	(c) Guardians <i>in loco parentis</i> to certain Children	242
(a) Duties	218	Casual Paupers	247
(b) Meetings	219	Bastard Children	250
(c) Contracts	220	OUT-DOOR RELIEF	250
Paid Officers of Guardians	221	General Rules	250
(a) Personnel	221	Wives and Families and Widows . .	251
(b) Appointment	221	Sickness and Accident	253
(c) Sureties	222	Relief to Pensioners	257
(d) Superannuation	223	Payments in Kind	257
(e) Criminal Liability	223	Relief to those in Work	258
Justices of the Peace	224	Supplemental Labour Test	264
Education of Pauper Children . . .	224	Medical Relief to Permanent Paupers	264
RELIEF OF THE POOR	225	Relief by Way of Loan	265
Relief Generally	225	Recovery of Relief from Paupers	265
Relief by Relatives	227	Apprenticing Pauper Children . .	267
VOL. XI.			14

Boarding Out Pauper Children	268	Estate	280
Burial of Paupers	269	Renting Tenement, Paying	
Cottage Homes	269	Rates, etc.	280
Deaf and Dumb Persons	269	Marriage	280
Emigration of Poor Persons	269	Parentage	281
Payment of School Fees	269	Birth	282
Pauper Lunatics	270	REMOVAL	282
Funds for the Relief of the		POOR NOT SETTLED IN ENGLAND	284
Poor	270	(a) Scotland, Ireland, Isle	
Metropolitan Poor	272	of Man, and Channel	
Discharged Prisoners	272	Islands	284
SETTLEMENT AND REMOVAL OF THE		(b) Foreign Poor	284
POOR	273	Liability of Guardians to Ser-	
Generally	273	vants and Paupers in Case of	
Persons Irremovable	274	Accident	284
Settlement	277	Rating	285
Residence	278	Forms	287
Apprenticeship	279		

The basis of the English poor law as at present administered is the celebrated 43 Eliz. c. 2, 1601. Before that Act the contributions for the relief of the poor were voluntary. Under the 27 Hen. VIII. c. 25, 1535, the scheme for the relief of the poor was by voluntary contributions, collected on Sundays by the churchwardens or two other persons in every parish. Next followed the 5 & 6 Edw. VI. c. 2, which made towards reducing the existing voluntary method of relieving the poor to a system, by directing the ministers and churchwardens of each parish to appoint annually two or more able persons to be gatherers and collectors of alms for the poor; and while the amount of each parishioner's contribution was generally left to himself to fix, in cases where this contribution was obviously inadequate to the means of the giver, the justices had power, on the complaint of the bishop of the diocese, to order the party in default to contribute such a sum as they considered reasonable. Subsequent legislation during the reign of Elizabeth provided for the appointment by the justices of four substantial householders, to be called overseers of the poor. It will be seen, therefore, that down to the year 1601 the relief of the poor was provided for by voluntary contributions, the collection of which had gradually become organised by legislation.

This state of things paved the way for the passing of the Poor Law Act, 1601, 43 Eliz. c. 2. It has been said that out of this statute more litigation, and a greater amount of revenue, have arisen, with consequences more extensive and more serious in their aspect, than ever were identified with any other Act of Parliament or system of legislation whatever (Burn's *Justice of the Peace*, tit. "Poor").

Sec. 1 of this statute provided for the appointment by two justices of four, three, or two substantial householders for every parish, who, together with the churchwardens, were to be called the overseers of the poor, and, with the consent of two or more justices, were directed "to raise, weekly or otherwise, by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate or propriations of tithes, coal-mines, or saleable underwoods in the said parish, in such competent sum and sums of money as they shall think fit, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff to set the poor to work on; and also competent sums of money for and towards the relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work.

The same section also provided for the apprenticing of pauper children, and directed the churchwardens and overseers to meet at least once a month, on Sunday afternoon, "to consider of some good course to be taken, and of some meet order to be set down in the premises;" they were also ordered to render accounts and hand over any balance in their hands to their successors. A penalty of twenty shillings was imposed for absence or negligence on the part of the churchwardens or overseers. Here, therefore, is the statute under which the overseers of the poor are still appointed, and the authority for the poor-rate.

Sec. 2 enabled the justices, if they perceived that the inhabitants of any parishes were unable "to levy among themselves sufficient sums of money for the purposes aforesaid," to rate any other parishes in the same hundred, or if the hundred was not able, then the justices at Quarter Sessions might rate any parishes in the county. The overseers were given power by sec. 4, with the consent of the lord of the manor, to build houses upon the waste land of the parish for the impotent poor. Sec. 6 enacted that "the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person," which is still the law. By the 7 Jac. I. c. 4, a remedy was provided in cases where persons ran away and left their families chargeable to the parish, such persons being deemed incorrigible rogues. This statute has since been repealed, but its place has been taken by the 5 Geo. IV. c. 83, 1824, which is to the same effect.

In order to protect the ratepayers of individual parishes against the burden of having to support paupers who might come from other parishes and endeavour to settle themselves, the 13 & 14 Car. II. c. 12, 1662, was passed, which, after reciting that "by reason of some defects in the law poore people are not restrained from going from one parish to another, and therefore doe endeavour to settle themselves in those parishes where there is the best stocke, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy, and when they have consumed it, then to another parish, and att last become rogues and vagabonds, to the great discouragement of parishes to provide stocks where it is lyable to be devoured by strangers," enabled two justices, on complaint of the churchwardens or overseers of the poor of a parish, to remove by warrant any person coming to inhabit in the parish in any tenement under the yearly value of ten pounds, and likely to become chargeable to that parish; the complaint was required to be made within forty days after such person came so to settle, and the removal was directed to be made to such parish where the person was "last legally settled, either as a native, householder, sojourner, apprentice, or servant, for the space of forty days at least, unless he or they give sufficient security for the discharge of the said parish, to be allowed by the said justices." In this way the law of settlement arose, with its numerous complications and modifications engrafted by subsequent legislation on this its original trunk (Burn's *Justice*, tit. "Poor"). Since, however, the foregoing remarks appeared in Burn's *Justice*, the 39 & 40 Viet. c. 61, 1876, has been passed, sec. 35 of which abolished derivative settlements, subject to certain exceptions in the case of married women and legitimate children.

In 1783 was passed the 22 Geo. III. c. 83, generally known as

"Gilbert's Act." The object of this enactment was to abolish the system of farming the poor that had been introduced by the 9 Geo. I. c. 7, and other abuses which had grown up under the laws relating to the poor. The Act was adoptive, and provided for the appointment of guardians of the poor, and the provision of workhouses, with power for two or more parishes to unite for the purposes of it. The first workhouse in England, however, seems to have been built at Bristol in 1697, under a special Act. But "Gilbert's Act" did not accomplish its main object, which was to put an end to the evils which had grown up by a lax administration of out-door relief under statutes passed subsequently to the Act of Elizabeth. So great had these become, that in 1832 a commission was issued "to make diligent and full inquiry into the practical operation of the laws for the relief of the poor in England and Wales, and into the manner in which these laws were administered, and to report their opinion as to what beneficial alterations could be made." The result of this inquiry was laid before Parliament in 1834, and the Commissioners reported—"That the fund which the 43rd of Elizabeth directed to be employed in setting to work children and persons capable of labour, but using no daily trade, and in the necessary relief of the impotent, had been applied to purposes opposed to the letter, and still more to the spirit of the law, and destructive to the morals of the most numerous class and to the welfare of all. That the great source of abuse was the out-door relief afforded to the able-bodied, on their account or on that of their families, given either in kind or in money."

This report led to the passing of the Poor Law Amendment Act, 1834, 4 & 5 Will. IV. c. 76. The Act was based on the principle that no one should be suffered to perish through the want of what is necessary for sustaining life; but at the same time that, if he be supported at the expense of the public, he must be content to receive such support on the terms most consistent with the public welfare; and the objects of the Act were—"First, to raise the labouring classes—that is to say, the bulk of the community—from the idleness, improvidence, and degradation into which the mal-administration of the laws for their relief has thrown them; and, secondly, to immediately arrest the progress, and ultimately diminish the amount, of the pressure on the owners of lands and houses" (Sir George Nicholl's *History of Poor Law*, vol. ii. p. 286).

The provisions of the 4 & 5 Will. IV. c. 76 may be briefly stated to be as follows:—The Crown was empowered to appoint three commissioners to sit as a board to carry the Act into execution. The administration of relief to the poor throughout England and Wales, according to the existing laws, was made subject to the control of the commissioners, who were authorised to issue rules, orders, and regulations for the management of the poor, for the government of workhouses, and the education of children therein, and for the apprenticing of poor children, and for the guidance and control of all guardians, vestries, and parish officers, so far as related to the management of the poor, and the keeping, examining, auditing, and allowing or disallowing of accounts, and making or entering into contracts, or any expenditure for the relief of the poor, and for carrying the Act into execution in all other respects as they should think proper; but they were not enabled to interfere in any individual case for the purpose of ordering relief. All the powers of "Gilbert's Act" and all other Acts relating to the providing of workhouses, the borrowing of money, and governing and employing the poor, were subjected to the control of the commissioners. The commissioners

were empowered to form poor law unions by uniting parishes for the administration of the poor laws. Power was also given to the commissioners, with the consent of the guardians or ratepayers, to build and enlarge workhouses. The appointment, duties, and salaries of paid officers for administering relief were placed under them. Provision was made for the affiliation of bastard children, and certain kinds of settlement were abolished. The removal of paupers to their place of settlement was regulated. By the 10 & 11 Vict. c. 109, the Poor Law Board was constituted, and the powers of the commissioners transferred to it. In the same year was issued the General Consolidated Order (July 24, 1847), which forms the foundation of that part of the poor law which rests upon orders. The present Local Government Board was established by the 34 & 35 Vict. c. 70, 1871, and is the successor of the Poor Law Board.

[During the last ten years various statutes which affect the administration of the poor laws have been passed and various important Local Government Board Orders promulgated. Among the more important Acts are the Association of Poor Law Unions, 1898, 61 & 62 Vict. c. 19; Removal, 1898, 61 & 62 Vict. c. 60, s. 22; Defective Children, 1899, 62 & 63 Vict. c. 32, s. 9; Control of Children (Workhouse), 1899, 62 & 63 Vict. c. 37; Removal, 1900, 63 & 64 Vict. c. 23; Cruelty to Children, 1904, 4 Edw. VII. c. 15, s. 26; Friendly Societies' Relief, 1904, 4 Edw. VII. c. 32; Relief of Released Prisoners, 1907, 7 Edw. VII. c. 14. These Acts and the Local Government Board Orders will be incorporated herein in their proper places.

The latest available report on poor law administration is the *Thirty-sixth Annual Report of the Local Government Board, 1906-1907* (Cd. 3665), from which it appears that "the total expenditure relating to the relief of the poor and matters wholly connected therewith during the year ended at Lady Day, 1906 (other than expenditure defrayed out of loans), amounted to £14,035,888, being £3,864,973 in London Unions, and £10,170,915 in Unions not in London" (*ibid.*, p. cxxxvii.). The expenditure has been steadily increasing for many years. Monthly "statements of pauperism" are by order of Parliament regularly published.

Owing to the steady increase in poor-law expenditure and the dissatisfaction expressed with the lax administration of relief by many unions there has been a growing public demand for searching inquiry into existing poor law methods of relief. This agitation was met by the appointment on December 4, 1905, of a Royal Commission "to inquire (1) into the working of the laws relating to the relief of poor persons in the United Kingdom; (2) into the various means which have been adopted outside of the poor laws for meeting distress arising from want of employment, particularly during periods of severe industrial depression, and to consider and report whether any, and, if so, what modification of the poor laws or changes in their administration or fresh legislation for dealing with distress are advisable."

This Commission has for some time been at work, and has taken evidence of methods of relieving the poor and unemployed both in the United Kingdom and abroad. Its report is expected early in the year 1909.]

AUTHORITIES AND OFFICERS FOR THE ADMINISTRATION OF THE POOR LAW.

Local Government Board.—The whole management of, and administration of relief to, the poor throughout England and Wales is subject

to the direction and control of the Local Government Board (4 & 5 Will. iv. c. 76; 34 & 35 Vict. c. 70). The Board, however, cannot interfere with the law of settlement and removal (*ibid.*). The Local Government Board have power to issue rules, orders, and regulations for the management of the poor generally, and from time to time to modify and alter such rules, orders, and regulations. A written or printed copy of every rule, order, or regulation of the Local Government Board must, before it comes into operation in any parish or union, be sent to the overseers of such parish, the guardians of such union or their clerk, and to the clerk of the justices of the petty sessions held for the division in which such parish or union is situate; and the overseers and guardians are required to notify and give publicity to the same, and preserve them and allow them to be inspected and copied by owners of property and ratepayers. Similar provisions apply to the disallowance or revocation of rules (4 & 5 Will. iv. c. 76, s. 18). The Board are required to cause a copy of every general rule, order, or regulation issued by them to be laid before both Houses of Parliament as soon as practicable after its publication. General orders must be published in the *London Gazette*, and when so published, no further publication is necessary (35 & 36 Vict. c. 79, s. 48; 38 & 39 Vict. c. 55, Sched. V. Pt. 111). By the 4 & 5 Will. iv. c. 76, s. 98, persons wilfully disobeying the rules, orders, and regulations of the Local Government Board may be punished. A rule, regulation, or order is valid if made under the seal of the Board, and signed by the president and countersigned by the secretary or assistant secretary, and the production of a rule, order, or regulation so signed and sealed is, until the contrary is shown, sufficient proof that it was duly made (34 & 35 Vict. c. 70). Any rule, order, or regulation made by the Local Government Board may be removed into the Queen's Bench Division of the High Court by *certiorari* (*ibid.*, ss. 105-108). Any written document signed or purporting to be signed by a secretary or assistant secretary of the Local Government Board, is *prima facie* evidence of the decision of the Board (29 & 30 Vict. c. 113, s. 4). [A large part of the control of the Local Government Board is exercised by the issue of circular-letters to the boards of guardians. These letters, while possessing no intrinsic legal force, are explanatory of statutes and of the general policy of the Board, and as such possess an authority often as effective as an order.] By the 4 & 5 Will. iv. c. 76, s. 26, the Local Government Board have power to form unions of parishes for poor-law purposes, and may dissolve or alter unions (39 & 40 Vict. c. 61, s. 11) and change the name of a union (*ibid.*, s. 13). [As to changing the area of a populous union without the consent in writing of two-thirds of the guardians, see *R. v. Local Government Board, Ex parte South Stoneham Union*, 1908, 14 Times L. R. 463. Under sec. 57 of the Local Government Act, 1888, the boundary of any parish in a county district not a borough may be altered by the county council, who also may transfer one part of a parish to another parish, all under confirmation of the Local Government Board. Part of a parish transferred to another parish does not destroy the identity of the latter, which remains in the union it has always belonged to, but with an accretion of area (*Bootle Guardians v. Whitehaven Guardians*, [1903] 2 Ch. 142).] The 29 & 30 Vict. c. 113, s. 18, enacts that in all statutes, except where there is something in the context inconsistent therewith, the word "parish" shall, among other meanings applicable to it, signify a place for which a separate poor-rate is or can be made, or for which a separate

overseer is or can be appointed. The Local Government Board has power to order workhouses to be built, enlarged, or repaired (4 & 5 Will. IV. c. 76, ss. 23, 25). [The guardians are required to keep workhouses in good and substantial repair, and remedy without delay any defect in the repair of the house, its drainage, warmth, or ventilation (Art. 151, General Order of 1847); see also *Circular-Letter*, Aug. 11, 1880, on *Drainage*; General Order, April 4, 1868.]

Inquiries.—By the 10 & 11 Vict. c. 109, s. 11, power is given to the Local Government Board to require the attendance of persons upon any matter connected with the execution of any of the powers vested in them, and may hold inquiries and require returns to be made to them. But no person can be required to go more than ten miles from his place of abode to attend an inquiry. Witnesses may be put on oath at these inquiries. The Board have also power, with the consent of the Treasury, to appoint inspectors for the purpose of conducting special inquiries, and may delegate to persons so appointed all such powers of the Board, as the Board may think necessary, for summoning witnesses and conducting such inquiry (*ibid.*, s. 22). By sec. 13 of the last-mentioned statute, the Local Government Board shall once in every year submit to His Majesty a general report of their proceedings, and every such report shall be laid before both Houses of Parliament within six weeks after the date thereof if Parliament be sitting, and if not sitting within six weeks after the next meeting of Parliament. [During the years 1906-8 public feeling was strongly moved by the wasteful extravagance of certain London unions. The inquiries held disclosed not only gross extravagance, but in some instances extensive corruption, which was afterwards the subject of criminal prosecution.]

Poor Law Inspectors.—Poor law inspectors are appointed and paid by the Local Government Board (10 & 11 Vict. c. 109, s. 20; 34 & 35 Vict. c. 70). They are entitled to visit and inspect every workhouse or place wherein any poor person in receipt of relief shall be lodged, and to attend every board of guardians and every parochial and other local meeting held for the relief of the poor, and to take part in the proceedings, but not to vote at such board or meeting (10 & 11 Vict. c. 109, s. 20). The inspectors may summon before them such persons as they may think necessary, for the purpose of being examined before them upon any matter concerning the administration of the laws relating to the relief of the poor, or any other matter placed by law under the control or regulation of the Commissioners, or for the purpose of producing and verifying upon oath any book, contracts, agreements, accounts, writing, or copies of the same, in anywise relating to such matter, and not relating to or involving any question of title to any lands, tenements, or hereditaments not being the property of any parish or union, and may examine any person whom they shall so summon, or who shall voluntarily come before them to be examined upon any such matter upon oath, which each of the said inspectors shall be empowered to administer, or instead of administering an oath, the inspector may require the party examined to make and subscribe a declaration of the truth of the matter respecting which he shall have been or shall be so examined; and all summonses made by any such inspector for any such purpose as aforesaid shall be obeyed by all persons as if such summons had been the summons and order of the Commissioners, and the non-observance thereof shall be punishable in like manner; and the costs and expenses of such person so summoned shall be paid in such cases in such manner as the costs and

expenses of persons summoned under the authority of the first-recited Act are now payable; provided always that no person shall be required in obedience to any such summons to go or travel more than ten miles from his place of abode. [For the purposes of inspection the country is mapped out into certain areas, each of which is assigned to an inspector. The work is done by fourteen general inspectors, two medical inspectors, four assistant general inspectors, and three ladies who act as inspectors of boarded-out children. Yearly reports are sent in to the Board by the inspectors on all matters connected with their work, and are commented on and usually published in part in the Annual Reports of the Board. For 1906 reports see *Thirty-sixth Report of the Local Government Board* (1906-1907), pp. cxxx. *et seq.*, 283 *et seq.* in Appendix.]

District Auditors.—District auditors are appointed by the Local Government Board under the 42 & 43 Vict. c. 6. The Board have power from time to time to appoint such number of district auditors as they may, with the sanction of the Treasury, think fit for the performance of the duties of auditing the accounts which are for the time being by law subject to be audited by district auditors, and may from time to time remove such auditors. The same statute gives the Local Government Board power to assign districts for which auditors are to act and to vary them from time to time. Assistant auditors may also be appointed. Auditors are paid out of moneys provided by Parliament, but a board of guardians is bound to prepare and submit to the auditor at every audit a financial statement in duplicate in the form prescribed by the Local Government Board, one of which duplicates has to be stamped according to the amount of the expenditure. The auditor is required to cancel the stamp by writing across it the amount of the expenditure audited and allowed, and to forward the duplicate statement so stamped to the Local Government Board (*ibid.*, s. 3).

Where the total of the expenditure comprised in the financial statement is	The sum shall be
Under £20, ...	5s.
£20, and under £50 . . .	10s.
£50, and under £100 . . .	£1
£100, and under £500 . . .	£2
£500, and under £1,000 . . .	£3
£1,000, and under £2,500 . . .	£4
£2,500, and under £5,000 . . .	£5
£5,000, and under £10,000 . . .	£10
£10,000, and under £20,000 . . .	£15
£20,000, and under £50,000 . . .	£20
£50,000, and under £100,000 . . .	£30
£100,000, and upwards . . .	£50

(*Ibid.*, Sched. I.) It is the duty of the district auditor to audit the accounts of the guardians of the poor of the several unions within his district and those of their officers, also the accounts of the overseers of the poor of the parishes comprised in the several unions. The accounts of the overseers are exempt from stamp duty (*ibid.*, s. 8). The Local Government Board may authorise any person selected by the auditor to act temporarily as his deputy (11 & 12 Vict. c. 91, s. 10).

The auditor is required to give or send by post to the overseers fourteen days' notice of the audit. He must also give the clerk of the guardians fourteen days' notice in writing of the time and place he intends to commence the audit of the accounts of the union, and of the parishes therein. This notice must also be advertised in some newspaper circulating in the county (*ibid.*, s. 11), and seven clear days at least (in reckoning the "seven clear days at least" the time must be reckoned excluding both the day of the act and that of the event, *R. v. Shropshire JJ.*, 1838, 8 Ad. & E. 173) before the day fixed for the audit of accounts, the overseers or other officers employed in any parish in carrying the laws for the relief of the poor into execution shall cause their rate books and other books of account to be made up and balanced (to the 25th March and 29th September in each year), and the books so made up shall forthwith be deposited at the place appointed, and any owner of property or ratepayer having an interest in the said accounts is entitled to inspect, examine, and copy the same after the accounts have been so deposited. As soon as the owners receive notice from the auditor of the day appointed by him for auditing the accounts, they must cause the notice to be affixed on the places where parochial notices are usually fixed (7 & 8 Vict. c. 101, s. 33). By the same section every ratepayer in any parish or union is entitled to be present at the audit of the accounts of the parish or union, and to make any objection to such accounts before the auditor. By Article 32 of the General Order for accounts of January 14, 1867, the clerk of the guardians shall, three clear days before the day appointed for auditing the union accounts, deposit the half-yearly statement of the accounts of the union, together with the relief order book and ledger, in the board room, and permit them to be inspected, examined, and copied by any ratepayer or owner of property in the union. [Ratepayer includes every person assessed to the poor-rates, whether in arrears or not. Even a bankrupt ratepayer may inspect the books (*Marginson v. Tildsley*, 1903, 67 J. P. 226); but a substantial question must be raised before the Court will grant a *mandamus* to inspect books (*R. v. Fleetwood U. D. Council*, 1904, 68 J. P. 314).]

Surcharging and Appeals therefrom.—Every auditor appointed for a district has full powers to examine, audit, allow, or disallow of accounts, and items therein relating to moneys assessed for and applicable to the relief of the poor of all the parishes and unions within his district, and to all other money applicable to such relief, and he is bound to charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting, or of any sum for which any such person is accountable, but not brought by him into account against such person, and shall certify on the face of every account audited by him any money, books, deeds, papers, goods, or chattels found by him to be due from such person (7 & 8 Vict. c. 101, s. 32). [*Cf.*, as to the power of an auditor to inquire into the negligence or misconduct on the part of any official or member of a metropolitan borough council in relation to accounts whereby loss has been occasioned to the council, and to assess the amount of the loss, *R. v. Carson Roberts*, [1907] 1 K. B. 407.] By Article 38 of the General Order for accounts, dated January 14, 1867, the auditor is required to audit the accounts of the union and the parishes comprised in it once in every half-year; that is to say, as soon as may be after 25th March and 29th September respectively. If any bill due to a solicitor be not taxed

before it is presented to the auditor, the auditor may tax it, and his decision on the reasonableness as well as the legality of the charges is final (7 & 8 Vict. c. 101, s. 39). If the auditor sees fit to surcharge any person not present at the audit, he should adjourn so much of the audit as relates to that particular matter, and communicate with the party (11 & 12 Vict. c. 91, s. 8). A person from whom any money is certified to be due by the auditors must pay over the same within seven days to the treasurer of the union (7 & 8 Vict. c. 101, s. 32), and if he fails in doing so the payment may be enforced in the same way as if it were due in respect of a poor-rate (47 & 48 Vict. c. 43, s. 11). Any person aggrieved by any allowance, disallowance, or surcharge may apply to the Queen's Bench Division for a writ of *certiorari* to remove it into the High Court (7 & 8 Vict. c. 101, s. 35). [And by Article 42 of the General Order of 1867 when an auditor disallows any payment or surcharges any sum upon any person he shall declare the ground of his decision, and offer to state such ground in writing, if required by the person aggrieved to do so, in the proper book of account forthwith, or so soon as the arrangements for the business of his audit will permit. The payment or repayment of money may be ordered by the Court wherever it is of opinion that the decision of the auditor was erroneous either in fact or law (*R. v. Haslehurst*, 1888, 51 J. P. 645).] But an appeal also lies to the Local Government Board, who have power to decide on the lawfulness of any allowance, disallowance, or surcharge made by an auditor (*ibid.*, s. 36). And by the 11 & 12 Vict. c. 91, s. 4, the Board has also power to decide an appeal to them on the merits; and although the allowance, disallowance, or surcharge may have been lawfully made by the auditor, to remit the disallowance or surcharge if it appears to them that it was incurred under such circumstances as make it fair and equitable that it should be remitted. An appeal to the Local Government Board may be made by letter stating clearly all the facts of the case and the reasons given by the auditor. The Board has prescribed forms for making appeals to them from the decision of an auditor (see *post*, p. 286).

[Though the High Court has jurisdiction to restrain guardians from the improper application of the poor-rates, this does not interfere with the power of the Local Government Board under sec. 4 (*ibid.*) to remit improper payments by guardians which have been disallowed by the auditor (*A.-G. v. Merthyr Tydfil Union*, [1900] 1 Ch. 516).]

Guardians of the Poor.—The guardians govern the workhouse and administer the relief of the poor, and their duties in these respects are prescribed by the Local Government Board, but they cannot act except at a meeting of the board of guardians (4 & 5 Will. iv. c. 76, s. 38). The only acts which guardians can do, without the consent, or being subject to the control of the Local Government Board, are the refusing of relief in any individual case, and the accepting, taking, and holding real or personal property for the benefit of their union, and the bringing of actions or preferring indictments in respect of such property, or on any contracts or securities given to them in virtue of their office (5 & 6 Will. iv. c. 69, s. 7). With the consent of the Local Government Board, guardians may subscribe to public hospitals and infirmaries, to institutions for blind or deaf and dumb persons, to associations for providing nurses, or for aiding boys or girls in service, or any other similar institutions or asylums (14 & 15 Vict. c. 105, s. 4; 42 & 43 Vict. c. 54, s. 10). Where the consent in writing of the majority

of the guardians is required, it is a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians, of which, and the business to be transacted thereat, not less than fourteen days' notice shall have been given to each guardian (45 & 46 Vict. c. 58, s. 12). The consent of the guardians of a union is necessary before the Local Government Board can order a workhouse to be built and, in some cases, enlarged (4 & 5 Will. IV. c. 76, ss. 23, 25; 29 & 30 Vict. c. 113, s. 8).

Mortgages and bonds given in pursuance of the rules, etc., of the Local Government Board, and contracts or agreements, or the appointment of any officer, are not liable to stamp duty (4 & 5 Will. IV. c. 76, s. 86). The guardians of any union or parish may pay the reasonable expenses incurred in the preparation or collection of information required of or by them respecting any matter which is under their management, supervision, or control, and if any such information is required from their officers the amount payable may, if there be any disagreement on the subject, be settled by the Local Government Board (39 & 40 Vict. c. 61, ss. 15, 16).

[Guardians may not meet on licensed premises, except in cases where no other suitable room is available for meetings, either free of charge or at a reasonable cost (Local Government Act, 1894, s. 61).] Meetings may be held in private, and when the conduct or character of any official or particular person is under discussion it is the proper course that the meeting should be private (*Purcell v. Sowler*, 1877, 2 C. P. D. 215; 41 J. P. 789; *Pittard v. Oliver*, [1891] 1 Q. B. D. 474). In *Pittard v. Oliver* the defendant, a member of the board, made use at a board meeting of certain slanderous words affecting the conduct and character of the plaintiff, who was an official of the board, but this the defendant did *bonâ fide*, and without malice. The occasion was held to be privileged, and therefore he was held not liable. The meeting was held in public, and several reporters were present, but this did not destroy the privilege. But it would probably have been otherwise if the presence of the reporters and the public was due to the action of the defendant. [See, also, *Royal Aquarium, Ltd. v. Parkinson*, [1892] 1 Q. B. 431.

The presence of a member who has a personal interest in proceedings before the board does not vitiate such proceedings even if he takes part in them (*Murray v. Epsom Local Board*, [1897] 1 Ch. 35).]

The district auditor has no right to be present at a meeting of the board; [though the Local Government Board thinks his occasional presence would lead to a better understanding of the accounts (2 Off. Cir. 207)]; the inspectors of the Local Government Board, on the other hand, are entitled to attend every meeting of a board of guardians, but not to vote at such meetings (10 & 11 Vict. c. 109, s. 20), [and, apparently, a *mandamus* will lie to compel the admittance of an inspector (Macmorran and Lushington's *Poor Law General Orders*, 1905 ed., vol. i. p. 56n.)]. Meetings of guardians are regulated by the rules in Sched. I. to the Public Health Act, 1875, 56 & 57 Vict. c. 73, s. 59. As to the removal of a disorderly member or stranger, reference may be made to *Doyle v. Falconer*, 1866, L. R. 1 P. C. 328; *Dobson v. Fussey*, 1831, 7 Bing. 305. Guardians are not entitled to charge the rates with the cost of refreshments at their meetings, [nor to have refreshments provided out of workhouse stores], nor for loss of time or the cost of conveyance to attend meetings of the board (11 Off. Cir. 80). Guardians may appoint a committee to consider and report on any special subject,

but no act or decision of such committee shall be deemed to be the act of the guardians (Art. 40, General Order, July 24, 1847). Guardians have no authority, however, to divide themselves into committees for the purpose of hearing and deciding applications for relief unless specially authorised to do so by the Local Government Board; nor can they delegate to a committee the opening of tenders for supplies. Guardians may not hold their meetings at different places throughout the union, but they might resolve themselves into a committee for the purpose of inquiring into and reporting to the board upon the cases of out-door paupers in any particular parish or parishes of the union (9 Off. Cir. 118).

The 55 Geo. III. c. 137, and 4 & 5 Will. IV. c. 76, ss. 51, 77, impose heavy penalties on persons having the management of the poor, if concerned in contracts for the supply of goods for the use of such poor. [As to what constitutes being "concerned in a contract," see the cases cited and discussed in Lumley's *Public Health*, 1902 ed., vol. i. pp. 805 *et seq.* See also generally Glen's *Public Health*, 1906 ed.] By the 22 & 23 Vict. c. 49, s. 1, guardians are required to discharge all their debts within the half-year in which they are incurred, or within three months after the expiration of the half-year, but not afterwards. Should they omit to do so, they can apply to the Local Government Board, who may extend the time if they think fit. Contracts, to bind guardians, ought to be under their seal, and should relate to some matter incident to the purposes for which they were incorporated. Guardians must pay every sum greater than £5 by order. This order is drawn upon the treasurer of the union, and must be signed by the presiding chairman and two other guardians at a meeting, and countersigned by the clerk (General Order, July 24, 1847, Art. 84). Cheques must be payable "to order," and in the form prescribed by the General Order, April 7, 1857. Cheques so drawn are exempt from stamp duty. A guardian signing a cheque drawn for an illegal purpose is liable to be surcharged by the auditor with the amount. Guardians are required to examine every bill exceeding £1 in amount presented to them for payment (*ibid.*, Art. 85). Subject to the approval of the Local Government Board, every board of guardians shall pay the costs of legal proceedings taken by the auditor. Guardians may also pay the expenses of deputations and of their representatives to a Poor Law Conference. [Subject to the regulations (which merely cite the Act) made by the Local Government Board (February 17, 1899), guardians may subscribe (£5 limit) to the "Association of Poor Law Unions," and may pay the reasonable expenses of any two representatives attending its meetings. But this attendance must have been expressly authorised by resolution held after seven days' notice. Such representatives must be either a guardian of the union in question or their clerk (Poor Law Unions Association (Expenses) Act, 1898, 61 & 62 Vict. c. 9).] The 7 & 8 Vict. c. 101, s. 31, enables guardians to bury the body of any poor person which may be within their parish or union, if they think fit, [but this as to drowned persons is a duty of the overseers (48 Geo. III. c. 75; 49 & 50 Vict. c. 20; and *R. v. Treasurer of Kent*, 1889, 22 Q. B. D. 603)]. Guardians acting in execution of their duties are protected by the Public Authorities Protection Act, 1893 (*q.v.* herein). See also tit. GUARDIANS OF THE POOR.

Overseers of the Poor.—Overseers may give temporary relief out of the poor-rate in kind but not in money, in cases of sudden and urgent

necessity, and not otherwise (4 & 5 Will. iv. c. 76, s. 54). When application is made to the overseers for relief by a vagrant or a person usually in the parish, and the case is not urgent in its nature, they should refer the applicant to the relieving officer of the district. If an overseer is ordered by a justice to give relief, he is bound to obey the order under a penalty of £5 (*ibid.*). Overseers and assistant-overseers may, in all cases of sudden and urgent necessity, give a written order to admit a pauper into the union workhouse. Where temporary relief is given under the above-mentioned circumstances, the overseer must forthwith report the case in writing to the relieving officer of the district, or to the board of guardians, and the amount of such relief, or the fact of having given such an order, as the case may be (Consolidated Order, July 24, 1847; and see *post*, p. 235). The same order also provides that if an overseer receives an order for medical relief from any justice he must, as soon as may be after complying with such order, report the fact to the relieving officer or the board of guardians. And if an overseer receives an order under the hands and seals of two justices, directing relief to be given to any aged and infirm person, without such person being required to go into the workhouse, he must forthwith transmit the same to the relieving officer of the district, to be laid before the guardians at their next meeting. Overseers should charge the value of the relief in kind they give in their accounts, and its legality will be for the auditor to decide upon at his audit. [Overseers giving relief in cases of "sudden and urgent necessity" do so entirely on their own responsibility, and the guardians need not reimburse them the outlay. In such an event the overseer himself puts the amount before the auditor, it being open to the guardians to object on the ground of illegality (2 Off. Cir. 218; 2 Off. Cir. 62).] See also tit. OVERSEERS.

Paid Officers of Guardians.—The guardians shall, whenever it may be requisite, or whenever a vacancy may occur, appoint fit persons to hold the under-mentioned offices, and to perform the duties respectively assigned to them:—(1) Clerk to the guardians; (2) treasurer of union; (3) chaplain; (4) medical officer for the workhouse; (5) district medical officer; (6) master of the workhouse; (7) matron of the workhouse; (8) schoolmaster; (9) schoolmistress; (10) porter; (11) nurse; (12) relieving officer; (13) superintendent of out-door labour; and also such assistants as the guardians, with the consent of the Local Government Board, may deem necessary for the efficient performance of the duties of any of the said offices (General Consolidated Order, July 24, 1847, Art. 153). The guardians may also employ subordinate officers and servants in connection with the relief of the in-door poor (Order, August 19, 1867). The guardians may appoint collectors of rates and vaccination officers. The ordinary and convenient practice is that the master and matron of a workhouse should be husband and wife. The officers so appointed to or holding any of the above offices, as well as all persons temporarily discharging the duties of such offices, shall respectively perform such duties as may be required of them by the rules and regulations of the Local Government Board in force at the time, together with such other duties, conformable with the nature of their respective offices, as the guardians may lawfully require them to perform (Order, July 24, 1847, Art. 154). No person is eligible to hold any parish office, or have the management of the poor in any way whatever, who shall have been convicted of felony, fraud, or perjury (4 & 5 Will. iv. c. 76, s. 48); [but this restriction does not now apply to parish or district

councillors or guardians, other provisions being substituted by the Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 46 (1)]. Every officer and assistant to be appointed under the order (*ibid.*) shall be appointed by a majority of the guardians present at a meeting of the board, consisting of more than three guardians, or by three guardians if no more than three be present. Every such appointment shall, as soon as the same has been made, be reported to the Local Government Board by the clerk (Order, July 24, 1847, Art. 155). [The usual method of appointment is by resolution of the Board of Guardians, which should be entered on the minutes, and for appointments worth less than £50 an appointment under seal is not necessary (*Smart v. West Ham Guardians*, 1855, 10 Ex. 867; 20 J. P. 596), but if the guardians are to be bound in the case of any salary exceeding £50, then an appointment under seal is necessary (*Dyte v. St. Pancras Guardians*, 1872, 36 J. P. 375). See also *Austin v. Bethnal Green Guardians*, 1874, L. R. 9 C. P. 91; 38 J. P. 248. Appointment is sufficiently proved by producing the minutes containing the record (Public Health Act, 1875, Sched. I., Part I., r. 10).

The medical officer is in an exceptional position, and his tenure of office is governed by the Medical Officers' Order of May 25, 1857. He holds office for life, unless he becomes insane, or disqualified, or is removed by the Local Government Board. He must be resident within the district (see the notes to this order in Macmorran and Lushington's *Poor Law General Orders*, 1905 ed., vol. i. pp. 343 *et seq.*).

The appointments relating to other officers are governed by the qualifications set forth in Articles 162-167 of the General Order of July 24, 1847.] The guardians are required to pay to the several officers appointed by them such salaries or remuneration as the Local Government Board from time to time direct or approve; and they may, with the consent of the Board, pay for extraordinary services (Order, July 24, 1847, Art. 172). Every treasurer, master of a workhouse (or matron where there is no master), collector, or relieving officer, every person hereafter appointed as clerk, and every other officer whom the guardians shall require to do so, shall respectively give a bond to the guardians conditioned for the good and faithful performance of the duties of the office, with two sufficient sureties, not being officers of the same union (*ibid.*, Art. 184). In lieu of a bond, the guardians may accept as security for any officer the guarantee of any company which shall have complied with the conditions contained in The Guarantee by Companies Act, 1867. With the consent of the Local Government Board, the guardians may dispense with security from their treasurer when he is a banker or a partner in a banking firm (Order, July 24, 1847, Art. 186). Guardians are required to provide for the safe custody of bonds given to them, and to cause them to be produced to the auditor, (*ibid.*, Arts. 86, 87). [As to the liabilities of sureties under these bonds, see the cases set forth and discussed in Macmorran and Lushington's *Poor Law General Orders*, 1905 ed., vol. i. pp. 200 *et seq.*]

Collectors and assistant overseers, whether appointed by the guardians, or under the 59 Geo. III. c. 12, s. 7, and by the 7 & 8 Vict. c. 101, s. 61, are bound to give security to the board of guardians. [See also General Order (Officers' Securities), February 2, 1872.

As to the security for the treasurer, see General Order, November 28, 1903.]

Every officer appointed to or holding any office under the Order of July 24, 1847, other than the medical officer, shall continue to hold the

same until he die or resign, or be removed by the Local Government Board, or be proved to be insane, to the satisfaction of the Local Government Board (Art. 187). A workhouse porter, nurse, assistant, or servant may be dismissed by the guardians without the consent of the Local Government Board, [and apparently that power is capable of being exercised without any previous notice to the person to be dismissed (*McGuigan v. Guardians of Belfast Union*, 1885, 18 L. R. Ir. 89)], but every such dismissal and the grounds therefor must be reported to the Board (*ibid.*, Art. 188) [if the person dismissed be clerk, chaplain, medical officer, dispenser, master, matron, nurse, schoolmaster or schoolmistress, but not otherwise (Orders of August 19, 1867, and September 7, 1899)]. The guardians have power to suspend any master, matron, schoolmaster, schoolmistress, medical officer, or relieving officer, and must forthwith report such suspension, together with the cause, to the Local Government Board (Orders, July 24, 1847, Art. 192; September 7, 1899). The Local Government Board may remove any officer of a workhouse (12 Vict. c. 13, s. 5). The guardians have no power to suspend or dismiss their clerk, treasurer, or chaplain, and if they have any reason to complain of any one of these officers, they should report the case to the Local Government Board, who will deal with the complaint according to their discretion.

[The guardians may appoint substitutes for any officers temporarily incapacitated from performing their duties or absent on leave. Medical officers must nominate a substitute on appointment who will take the work in the absence of the permanent holder of the office (Art. 193, Order of July 24, 1847).]

The Poor Law Officers Superannuation Act, 1896, 59 & 60 Vict. c. 50, provides for superannuation allowances to poor-law officers. A scale of contributions by the officers from their salaries* is prescribed by the Act, which is obligatory on all officers appointed after it came into force. Existing officers and servants had power to exclude themselves from its operation. [Before any person can claim an allowance he must—(1) have become incapable of discharging the duties of his office with efficiency, by reason of permanent infirmity of mind or body, or of old age; or (2) have attained the age of sixty years, and have completed an aggregate service of forty years; or (3) have attained the full age of sixty-five years (*ibid.*, s. 2).] Compensation may be given to officers deprived of their office by the dissolution of a union (30 & 31 Vict. c. 106, s. 20; *R. v. Poor Law Board*, 1871, L. R. 6 Q. B. 785), or by reason of a parish having been united to another parish to form a union (33 & 34 Vict. c. 2, s. 10), [and where an officer who has not served the statutory period which entitles him to an allowance is compelled to give up his appointment through any cause other than his own misconduct or voluntary resignation, he is entitled to a return of all the contributions he has made towards the superannuation fund (59 & 60 Vict. c. 50, s. 8)]. And further, if any officer suffers any direct pecuniary loss by abolition of office, or by diminution or loss of fees or salary in consequence of anything done under the Local Government Act, 1894, 56 & 57 Vict. c. 73, he is entitled to compensation (*ibid.*, s. 81 (7)).

[*Criminal Liability of Officers and Servants.*—For bribing or attempting to bribe any officer or servant of a board of guardians, or attempting to do so, directly or indirectly, see the Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict. c. 69. The Act applies both to the person bribing and the person bribed. As to the common-law offence of

bribery of officials, see Stephen's *Digest of Criminal Law*, art. 137. See also the Prevention of Corruption Act, 1906, 6 Edw. VII. c. 34, which applies generally. By the Poor Law Amendment Act, 1834, 4 & 5 Will. IV. c. 76, s. 77, no person concerned in the administration of the laws for the relief of the poor may be interested in any contract for the supply of goods or food to the guardians, and any such person is liable to a fine of £5 on summary conviction. See the cases cited in Macmorran and Lushington, *supra*, vol. i. p. 77. As to the meaning of "interested," see *ante*, p. 220.]

Justices of the Peace.—Before the passing of the Local Government Act, 1894, justices of the peace were *ex-officio* guardians of the poor for the unions in which they resided, but this is no longer so (56 & 57 Vict. c. 73, s. 20 (1)). In certain cases, however, justices may grant relief. Any two justices, usually acting for the district in which the union is situated, may in their discretion, by order under their hands and seals, direct that relief shall be given to any adult person who shall from old age or infirmity be wholly unable to work, without requiring that such person shall go into the workhouse (4 & 5 Will. IV. c. 76, s. 27). And justices may order overseers to grant relief in cases of urgent necessity (*ibid.*, s. 54). Justices have also authority in removals (see p. 282, *post*). Any justice of the peace may at all times in the day-time visit the workhouse of the union or parish in which he resides, and examine into the state and condition of the poor therein, and their food, clothing, and bedding, and the condition of the house, with power to summon the master, if there is cause of complaint, to appear before the justices at Quarter Sessions to answer such complaint.

In cases requiring an immediate remedy, two justices may make an order. Such an order will hold good until the next Quarter Sessions (30 Geo. III. c. 49, ss. 1 and 2). In parishes not within the operation of secs. 5 (1), 33 (1) of the Local Government Act, 1894, justices appoint the overseers and assistant overseers (43 Eliz. c. 2, s. 1; 14 Car. II. c. 12, s. 21; 59 Geo. III. c. 12, ss. 7, 35; 12 & 13 Vict. c. 8, s. 1). See OVERSEERS. Poor rates to be valid must be allowed by two justices of the peace (43 Eliz. c. 2, s. 1; 12 & 13 Vict. c. 64). See RATING.

Education of Pauper Children.—The Local Government Board have power to combine unions, or parishes not in union, or such parishes and unions, into school districts for the management of any class or classes of infant poor not above the age of sixteen, being chargeable to any such union or parish, who are orphans, or are deserted by their parents, or whose parent or surviving parent or guardians are consenting parties to the placing of such children in the school of the district (7 & 8 Vict. c. 101, s. 4; and see 11 & 12 Vict. c. 82, s. 1; and 30 & 31 Vict. c. 106, s. 16). By sec. 42 of the 7 & 8 Vict. c. 101 a board is to be constituted for every district so formed, to consist of members to be elected from amongst the persons rated in the district to the relief of the poor by the guardians of such parishes or unions as are governed by guardians, and if there are no such guardians, then by the overseers of a parish not governed by such guardians. The members of a district board are required to have such a property qualification not exceeding the net annual value of £40, as the Local Government Board may fix, and are elected for three years. The chairman of a board of guardians is *ex officio* a member of a district board. Every such board have the powers of guardians for the relief and management of the poor within any school or asylum (*ibid.*, s. 43). [The Poor Law Act, 1903, 3 Edw. VII. c. 19, gives powers to dissolve

school districts, and for facilitating adjustments on alteration of areas or authorities under the Poor Law Acts.

The education of children in poor-law or workhouse schools is controlled by the General Order (Instruction of Children in Workhouses and in Separate and District Schools) of the 30th January 1897, which prescribes regulations with respect to their attendance and the time during which they may be employed in industrial training or in manual or industrial work. Where children attend "half-time" it is usual for them to attend school in the morning and to be employed on industrial work in the afternoon. These regulations do not apply to children receiving instruction in public elementary schools (*Twenty-seventh Annual Report, Local Government Board*, p. 5). The method of instruction, in so far as is practicable, follows the rule of the public elementary schools. The religious teaching is governed by the General Order (Religious Instruction of Orphans in Workhouses), August 23, 1859. In substitution of the annual grants formerly made by the Exchequer in respect of the remuneration of teachers in poor-law schools, payments are now made by the county and county borough councils (Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 24). The sums paid are such as may be certified by the Local Government Board to be due. The inspection of poor-law schools has been transferred from the Local Government Board to the Board of Education. As to the duties of the schoolmaster and schoolmistress, see Articles 103, 212 of the General Order, July 24, 1847. The elementary education of pauper blind and deaf children is the duty of the local education authority (Elementary Education (Blind and Deaf Children) Act, 1893, 56 & 57 Vict. c. 42, s. 2 (2)); but children resident in workhouses or boarded out by the guardians are not included in the Act (*ibid.*). The education of boarded-out children is conducted in the nearest public elementary school. The majority of pauper children are now by arrangement educated in the ordinary public elementary schools. Generally, for the different classes of schools and the children educated therein, see *Thirty-sixth Annual Report, Local Government Board* (1906-7), pp. 387 *et seq.*

RELIEF OF THE POOR.

Relief Generally.—It is the duty of the guardians to relieve the poor in their destitution (4 & 5 Will. IV. c. 76, ss. 38, 54). But this duty applies only to relieving existing destitution, and the guardians have no power to apply the rates in preventing a person becoming destitute, nor for purchasing tools or redeeming pledges, or for purposes of a like nature. [The High Court has jurisdiction to restrain guardians from applying the poor-rates improperly (see *Attorney-General v. Merthyr Tydfil Union*, *post*).] But when the destitution is self-imposed and the guardians are satisfied that persons supported by the poor-rate can obtain work at wages adequate for the maintenance of themselves and families, the guardians would be justified in refusing relief. But before they go to this length they must be in a position to state definitely where work can be obtained, and it is not sufficient to say vaguely to applicants that "employment may be had" (3 Off. Cir. 23). When work which a pauper can readily accept is offered at adequate wages, the Poor Law Board thought that it would be proper in most cases for the guardians to direct the discharge of the pauper to whom the employment is offered after due notice of their intention to do so. But if it is admitted that the man cannot procure a house, either in his own parish

or elsewhere, the Board did not advise that he should be ejected from the workhouse against his will, so long as his inability to procure shelter for himself and family existed (7 Off. Cir. 199). To be entitled to relief, the applicant must be actually destitute of means, from his own resources, of obtaining food, clothing, and shelter necessary for his immediate wants; and unless he is so destitute, the authorities cannot interfere (*cp.* 43 Eliz. c. 2, s. 1).

[Where able-bodied men (who can, if they choose, obtain work which will enable them to maintain themselves, their wives, and their families) refuse, by reason of a strike or otherwise, to work, they are not entitled to poor relief, unless they become physically incapable of working, when the guardians may give them temporary relief to keep them from starving. But even in such a case they ought to be prosecuted by the guardians as idle and disorderly persons, under sec. 3 of the Vagrancy Act, 1824. Arising out of the above, however, it may be noted that the wives and children of "strikers" are entitled to relief, as also are men intimidated from working. A general strike does not of itself create a case of "sudden and urgent necessity" within the meaning of sec. 4 of the Poor Law Act, 1834 (*Attorney-General v. Merthyr Tydfil Union*, [1900] 1 Ch. 516).]

Relief may be given on loan. It rests entirely with the guardians to determine in what manner relief should be given. An order for medical relief in midwifery cases may be given by way of loan. If the pauper is unable to repay the cost of relief given by way of loan, he can represent his inability to the board of guardians, and it is competent in them not to enforce it (4 Off. Cir. 123). Such a loan may be recovered before the justices under sec. 59 of the 4 & 5 Will. iv. c. 76, or in the County Court under the 11 & 12 Vict. c. 110, s. 8. The husband or father is considered as the person to whom the relief of his family is given, and he is liable not only for relief given to him, but given on his account (4 & 5 Will. iv. c. 76, s. 58).

[By the Out-door Relief Friendly Societies Act, 1904, 4 Edw. vii. c. 32, the guardians, in granting relief to a member of any friendly society, are not to take into consideration any sum received from such friendly society as sick-pay, except in so far as such sum shall exceed 5s. per week.]

Relief is sometimes given by guardians to paupers not settled in their union on the account of the union in which they are legally settled. These are known as "non-settled poor." And the guardians of a union in which a pauper is settled, but does not reside, may relieve him through the agency of the guardians in whose union he may be. In such a case the pauper would come under the designation "non-resident poor." The relief of non-settled and non-resident poor is regulated by the General Order, July 24, 1847, Articles 77-80. The guardians may remit relief by other agency if they think fit, but if two boards agree to act together these rules must be observed. [As to rendering accounts as between two unions in relation to non-settled poor relief and statutes of limitation, see *Wycombe Union v. Eton Union*, 1857, 1 H. & N. 687, 21 J. P. 70.]

Pauper children sent to a school outside their union fell ill with scarlet fever, and were removed by the school authorities to a joint hospital to which the union did not contribute. On the hospital board claiming to recover from the union, it was held that (1) there were no statutory provisions for recovery; (2) the school authorities had no

authority to pledge the union to any expenses beyond ordinary school expenses; (3) there was no such urgency as to create an implied request by the union to the hospital board to maintain the children in the hospital (*Bury Hospital Board v. Guardians of Chorlton*, 1906, 70 J. P. 31; 4 L. G. R. 489).]

Relief by Relatives.—By the 43 Eliz. c. 2, s. 6, the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person in that manner, and according to that rate as shall be assessed by the justices. This section applies to blood relations only (*R. v. Dempson*, 1734, 2 Stra. 955), and inability to work on the part of the person sought to be maintained is a condition precedent (*R. v. Gulley*, 1714, Foley, 47; 1 Bott P. L. Cas. 431). The order must state this by way of adjudication, and not merely as a recital of a complaint made (*R. v. Sitton*, 1719, Set. & Rem. 83, pl. 111; *R. v. Tripping*, 1718, 1 Bott P. L. Cas. 430; *R. v. Penmoyer*, 1727, 1 Bott P. L. Cas. 433). Inasmuch as the statute applies to blood relations only, a man cannot be compelled to contribute to the maintenance of his wife's mother (*R. v. Munday*, 1717, 1 Stra. 190; Set. & Rem. 91; 2 Raym. (Ld.) 1454), or of his wife's child by a former husband (*Woodford v. Lilburn*, 1747, 1 Bott P. L. Cas. 451), or of his son's wife or widow (*R. v. Kempson*, 1734, 1 Bott P. L. Cas. 450), or of his own brother, as a brother is not mentioned in the statute (*R. v. Smith*, 1826, 2 Car. & P. 449). But a grandfather is liable for the maintenance of his grandchild although the father be alive, if the latter is unable to support him (*R. v. Joyce*, 1707, 16 Vin. Abr. 423; *R. v. Cornish*, 1831, 2 Barn. & Ald. 498; 23 J. P. 811), but a grandchild is not liable to support a grandfather (*Maund v. Mason*, 1874, L. R. 9 Q. B. 254; 43 L. J. M. C. 62; 38 J. P. 538). Adultery, if not condoned, discharges a husband from liability to maintain his wife (*Culley v. Charman*, 1881, 7 Q. B. D. 89); but it does not discharge a son from liability to support his mother (*In re Constable*, 1886, 31 Sol. Jo. 15). [As to questions of non-access of husband which are for the justices to decide, see *Ulverstone Guardians v. Park*, 1889, 53 J. P. 629.] A woman under coverture possessing a separate estate is not bound to support her father (*Guardians of Pontypool v. Buck*, [1906] 2 K. B. 896), but she is liable for the maintenance of her husband, children, and grandchildren (Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, ss. 20, 21); but on the other hand the Act does not thereby relieve the husband from any liability to maintain her children or grandchildren (*ibid.*). The marriage of the mother does not relieve her children by a previous marriage of the liability to maintain her whilst living with her second husband, who together with her has become chargeable (*Arrowsmith v. Dickenson*, 1887, 20 Q. B. D. 252; 52 J. P. 308; 36 W. R. 507; 58 L. T. 632). An order cannot be made on a putative father, or on the mother, to maintain an illegitimate child (*R. v. Maude*, 1843, 11 L. J. M. C. 120; 6 Turn. 646). [The fact that an order has been made against a husband for maintenance of his wife does not exempt her son from liability to contribute towards her maintenance if the father is unable to pay the whole of the sum required (*Cole v. Brown*, [1907] 2 K. B. 301).] An order of the justices made under 43 Eliz. c. 2, s. 7, is recoverable as a civil debt (Summary Jurisdiction Act, 1879, ss. 6, 35), and the six months' limitation in the 11 & 12 Vict. c. 43, s. 11, does not apply (*Ulverstone v. Park*, 1889

53 J. P. 629). [The question of the "ability" of the person sought to be charged is one for the justices, and a person cannot be imprisoned unless there has been some inquiry into his means, and *à fortiori* if he has no means (*In re Gamble*, [1899] 1 Q. B. 305). There is no appeal to Quarter Sessions against an order of justices to pay towards maintenance *R. v. London Justices*, [1900] 1 Q. B. 438). A person cannot escape liability by transferring his property before order made to a third party and pleading no means (*Coulson v. Davidson*, 1906, 5 L. G. R. 56; 71 J. P. 17).] The justices have no power under the 43 Eliz. c. 2, s. 7, to order a relation to take the pauper into his house and maintain him (*R. v. Jones*, 1679, Foley, 41). By sec. 56 of the 4 & 5 Will. IV. c. 76, if a man marries a woman with a child, whether legitimate or illegitimate, he is bound to maintain it until it reaches the age of sixteen, or until the death of the mother, and the child is to be deemed, for the purposes of that Act, part of his family. [But guardians maintaining an illegitimate child may apply to the justices for a bastardy order against a putative father, notwithstanding that the child's mother has married a man who is able to maintain it (*Guardians of Plymouth v. Gibbs*, [1903] 1 K. B. 177).]

A person being able either wholly or partly to maintain himself and his family, and wilfully refusing or neglecting to do so, whereby either he or they become chargeable, is to be deemed an idle and disorderly person, and to be dealt with as such (5 Geo. IV. c. 83, s. 3). An idle and disorderly person is liable to imprisonment for not exceeding one calendar month with hard labour, or a fine not exceeding £5 (*ibid.*, and Summary Jurisdiction Act, 1879, s. 4). *Mens rea* must be shown to obtain conviction, and thus where a man stopped an allowance he had been making to his wife under a separation deed because he believed she had committed adultery subsequent to the deed, the Queen's Bench Division held that the justices had rightly dismissed the information. A husband cannot be dealt with under the above section for not maintaining his wife if she is a lunatic, and chargeable as such. In *Flannagan v. Bishop Wearmouth*, 1857, 27 L. J. M. C. 46; 22 J. P. 464, it was held that a man cannot be punished as an idle and disorderly person for refusing to maintain his wife if she refuses to live with him, even though it be proved he has ill-treated her and she is afraid to live with him; nor if she has left him and is living in adultery with another man, although he himself may have been subsequently guilty of adultery (*R. v. Flintan*, 1830, 1 Barn. & Adol. 227). By the 31 & 32 Vict. c. 122, s. 33, the justices may make an order on a husband to contribute to the cost of relieving his wife if she has become chargeable. These proceedings may be taken by the guardians. An order may be made where the wife is living absent from her husband, and she refuses to return to him, if the justices find that she was justified in leaving and refusing to return to the husband's house (*Thomas v. Alsop*, 1870, L. R. 5 Q. B. 151; 34 J. P. 625; 39 L. J. 43). [Requests by a husband to a wife to return and live with him which are not made *bonâ fide*, and are meant to be refused, do not absolve the husband from liability for maintenance (*Graves v. Graves*, 1864, 33 L. J. Prob. 66; 10 L. T. 273; *Kershaw v. Kershaw*, 1887, 51 J. P. 646). A man who *bonâ fide* believes his wife has committed adultery, and makes an offer to provide to some extent for his children, cannot be convicted of a wilful refusal to maintain his wife (*Morris v. Edmonds*, 1897, 77 L. T. 56).] The order may be for a greater sum than will reimburse the amount actually

paid in relief. Thus where the amount of relief which had been paid to a wife was three shillings a week, and the guardians proved that the husband's means were sufficient to enable him to allow his wife fifteen shillings a week, and the justices made an order for that amount, the order was held to be good. The section does not, however, entitle the justices to make an order in the nature of alimony (*Dinning v. South Shields Union*, 1884, 13 Q. B. D. 25; 53 L. J. M. C. 90; 48 J. P. 708). Arrears under an order are recoverable as a civil debt. Since 1870 a married woman having separate property is similarly liable to be compelled to maintain her husband if he becomes chargeable (33 & 34 Vict. c. 93, s. 13, and 45 & 46 Vict. c. 75, s. 20). By sec. 71 of the Act 4 & 5 Will. iv. c. 76, the mother of an illegitimate child, so long as she shall be unmarried or a widow, is bound to maintain it as part of her family until it reaches the age of sixteen, and all relief granted to such child while under that age is deemed relief granted to the mother. But this liability ceases on the marriage of the child if a female.

Soldiers and Sailors.—By the Army (Annual) Acts, 1881, 82, 83, 91, 99, 1904, a soldier of the regular forces is liable to contribute to the maintenance of his wife and family to the same extent as if he were not a soldier; but execution shall not issue against his person, pay, etc.; nor shall he be liable to be punished for the offence of deserting or neglecting to maintain his wife or family, or any member thereof, or of leaving her or them chargeable to any union, parish, or place (Army Act, 1881, s. 145). By the same section and sec. 7 of the Army (Annual) Act, 1883, it is enacted that if a man becomes a soldier after an order has been made against him to contribute either to the cost or maintenance of his wife and child, or of any bastard child of which he is the putative father, or of the cost of any relief given to his wife or child by way of a loan, a copy of the order is to be sent to the Secretary of State; and in case of such order being so sent, or it appearing to the satisfaction of a Secretary of State, that a soldier of the regular forces has deserted, or left in destitute circumstances without reasonable cause, his wife, or any of his legitimate children under fourteen years of age, the Secretary of State shall order a portion, not exceeding one shilling a day, for wife and children, and sixpence a day for a bastard child, of the daily pay of a non-commissioned officer who is not below the rank of a sergeant, and not exceeding sixpence and threepence for the same cases as regards the daily pay of any other soldier, to be deducted from such daily pay, and to be appropriated in the first case in liquidation of the sum adjudged to be paid by such order; and in the second case, towards the maintenance of such wife and children, in such manner as the Secretary of State thinks fit. [Under the Acts the Secretary of State has deputed his authority, and in all cases concerned the person to address is the general officer commanding the district in which the soldier may be serving. These provisions extend to militia in training or embodied (*Twenty-ninth Ann. Rep. L. G. B.*, pp. 26, 27). As to relief to wives of first-class army reserve men, in case the reserves are called out, see *Twelfth Ann. Rep. L. G. B.*, p. 43.] Provision is made by the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 182, for the maintenance of a seaman's family while he is away on a voyage, by enacting that if the wife or children of any seaman become chargeable, the union is to be reimbursed out of his wages. Notice of the claim must be given to the owner of the ship (*ibid.*, s. 183).

[Where discharged soldiers with no pensions or only small pensions become chargeable to a union it is advisable for the board of guardians to communicate with the Secretary, Royal Hospital, Chelsea, S.W., provided that these cases are suffering from disabilities due to military service. On this question, and on that of discharged sailors, see the Off. Cir., June 12, 1906.]

Where a person wilfully refuses to maintain himself when work is offered him upon conditions, regard must be had to the reasonableness of such conditions. In order to constitute a wilful refusal the condition must attach to the work itself and not to the workman's conduct (*Poplar Guardians v. Martin*, [1905] 1 K. B. 728), a labour colony case. A person whose habit of drinking to excess causes illness which makes him chargeable to the union is not thereby "an idle and disorderly person," whose action constitutes a wilful neglect to maintain himself (*St. Saviour's Union v. Burbridge*, [1900] 2 Q. B. 695).]

Every person running away and leaving his wife or his child or children chargeable, or whereby she or they, or any of them, shall become chargeable to any parish, township or place, or to the common fund of the union, is punishable as a rogue and a vagabond, that is, by imprisonment with hard labour not exceeding three calendar months, or a fine not exceeding £25 (5 Geo. IV. c. 83, s. 4; 12 & 13 Vict. c. 103, s. 3). Proceedings may be taken for this offence at any time within two years after chargeability, and the summons or warrant may be issued on the complaint of the relieving officer (39 & 40 Vict. c. 61, s. 19). The offence of desertion under 5 Geo. IV. c. 83, s. 4, is not complete until chargeability (*Reeves v. Yeates*, 1862, 31 L. J. M. C. 241).

[A parent convicted of running away and leaving his family chargeable (under sec. 4 *ibid.*) was imprisoned and underwent his sentence. On his release he again absconded without removing the family from the workhouse, and it was held that he could again be convicted of running away and leaving his family chargeable (*Bannister v. Sullivan*, 1904, 2 L. G. R. 874; 68 J. P. 390).]

The word "child" in this statute does not include "bastard child," and therefore a man cannot be convicted of running away and leaving his wife's illegitimate child chargeable (*R. v. Maude*, 1843, 6 Turn. 646; 11 L. J. M. C. 120). In *Peters v. Cowie*, 1877, 2 Q. B. D. 131; 46 L. J. M. C. 177, the Court held that a married woman who, deserted by her husband, and having no means of supporting her children, leaves them so that they become chargeable, cannot be convicted under sec. 4 of the 5 Geo. IV. c. 83. By the 5 Geo. I. c. 8, the property of persons who run away and leave their families chargeable may be seized and sold under an order of the justices, and the proceeds paid over to the guardians, to be applied by them towards discharging the cost of maintaining the families so deserted and left chargeable. [A woman who deserts her bastard child, whereby it becomes chargeable, is punishable as a rogue and a vagabond (7 & 8 Vict. c. 101, s. 6). See also the Prevention of Cruelty to Children Act, 1904, 4 Edw. VII. c. 15, s. 1.] In the event of a bastard child becoming chargeable to the union after the mother has obtained an affiliation order, the justices may, under sec. 7 of the 35 & 36 Vict. c. 65, appoint a relieving officer of the union to receive, on account of the union, the payments ordered to be made by the father for so long as the child shall remain chargeable. Where the mother has not obtained an order, sec. 5 of the 26 Vict. c. 9 enables the guardians to proceed for one, and recover and retain the payments made

under it. An application can be made by the guardians at any time whilst the child is under thirteen years of age. The mother of an illegitimate child has a natural right to the custody of it (*R. v. Nash, In re Carey*, 1883, 10 Q. B. D. 454; 52 L. J. Q. B. 442; 48 L. T. 447).

The Workhouse.—The establishment of workhouses is regulated by the 4 & 5 Will. IV. c. 76, and is under the control of the Local Government Board. Under sec. 23 the Board has power, with the consent of the majority of the guardians of a union, to order the workhouse to be built, and that land be acquired for a site. But where a workhouse already exists, the Local Government Board may, independently of the consent of the guardians, order it to be enlarged, and provided with proper drainage, sewers, ventilation, fixtures, furniture, surgical and medical appliances, and other conveniences (*ibid.*, s. 25; 31 & 32 Vict. c. 122, s. 8). But the guardians cannot be compelled to raise a principal sum for these purposes which exceeds one-tenth of the average annual amount of the rates raised for the relief of the poor during the three previous years (29 & 30 Vict. c. 113, s. 8). If the guardians themselves decide to enlarge, alter, or improve their workhouse at a cost not exceeding £500, and the Board give their consent thereto, they do not require any further order to enable them to do so (*ibid.*) By sec. 9 of the 34 & 35 Vict. c. 108, the guardians are bound to provide such casual wards, with fittings and furniture, as the Local Government Board deem necessary.

The guardians may, with the consent of the Local Government Board, borrow money for any permanent work or object, and their powers in this respect are now regulated by the 52 & 53 Vict. c. 56, s. 2 [and the Poor Law Act, 1897, 60 & 61 Vict. c. 29]. But loans incurred previously to these Acts are still subject to the statutes in force at the time they were raised (*ibid.*). The guardians are required to keep a register of the securities in respect of all sums borrowed by them, in the form prescribed by the Local Government Board (45 & 46 Vict. c. 58, s. 14). For the purposes of relief, settlement, and removal of poor persons and the burial of the poor, the workhouse of any union is deemed to be situated in the parish in which each poor person respectively to be relieved, removed, or buried, is or has been chargeable. Births and deaths in a workhouse are to be registered in the parish or place where the workhouse is situated (7 & 8 Vict. c. 101, s. 56). [See also Registration of Births and Deaths Act, 1874, 37 & 38 Vict. c. 88, ss. 1, 48.] With regard to the burial of any poor person dying in the workhouse of any union, sec. 10 of the 28 & 29 Vict. c. 79 directs that the workhouse is to be considered as situated in the parish in the union where the poor person last resided previously to being removed into the workhouse.

The guardians shall once at least in every year, and as often as may be necessary for cleanliness, cause all the rooms, wards, offices, and privies belonging to the workhouse to be limewashed (Order, July 24, 1847, Art. 150). It is the duty of the master to take care that all the wards, rooms, larder, kitchen, and all the offices of the workhouse, and all the utensils and furniture thereof, are kept clean and in good order; and where any defect in the same occurs, to report it to the guardians (*ibid.*, Art. 208 (24)); [and it is the duty of the visiting committee (Art. 149) to make inquiries as to cleanliness, ventilation, and bedding, and to report to the guardians]. It is the especial duty of the matron to assist the master in cleaning and ventilating the sleeping wards and dining-hall,

and all parts of the premises (*ibid.*, Art. 210 (13)). It is also the duty of the medical officer to report in writing to the guardians any defect in the drainage, ventilation, warmth, or other arrangements which he may deem detrimental to the health of the inmates (*ibid.*, Art. 207 (6)). His reports are to be entered in a book termed the Workhouse Medical Officer's Report-Book (General Order, April 4, 1868, Art. 1), which is to be laid before the guardians (*ibid.*, Art. 2).

The guardians shall cause the workhouse and all its furniture and appurtenances to be kept in good and substantial repair; and shall, from time to time, remedy without delay any such defect in the repair of the house, its drainage, warmth, or ventilation, or in the furniture or fixtures thereof, as may tend to injure the health of the inmates (General Order, July 24, 1847, Art. 151). The guardians are empowered to supply the workhouse with all requisite furniture and necessaries. It is for them to purchase what is necessary in this respect, and the (Local Government) Board cannot interfere in the matter. If the guardians should be of opinion that a collection of books for the use of the workhouse inmates is desirable, they are at liberty to exercise their own judgment in purchasing what shall appear to them to be necessary, and it will be for the auditor to decide whether they have exceeded their legal powers (11 Off. Cir. 85).

Visiting Committee.—The guardians shall appoint one or more visiting committees from their own body; and each of such committees shall carefully examine the workhouse or workhouses of the union once in every week at the least, inspect the last reports of the chaplain and medical officer, examine the stores, afford, so far as is practicable, to the inmates an opportunity of making any complaints, and investigate any complaints that may be made to them (General Order, July 24, 1847, Arts. 148, 149). If the guardians neglect to appoint a visiting committee, the Local Government Board may appoint a paid visitor, who cannot be one of the guardians; this appointment to cease next after the appointment of a visiting committee (10 & 11 Vict. c. 109, s. 24).

The visiting committee shall from time to time write such answers as the facts may warrant to the queries, which are to be printed in a book, entitled the visitor's book, to be provided by the guardians, and kept in every workhouse for that purpose, and to be submitted regularly to the guardians at their ordinary meetings (Order, July 24, 1847, Art. 149).

The board of guardians, when they appoint the visiting committee, should specify the quorum who are to be empowered to act; but if no such quorum be named by the guardians, the Local Government Board think that all the members of the committee must act together (11 Off. Cir. 102). The visitor's book is intended to be kept for the exclusive use of the visiting committee, and all entries therein should be made by that committee. The members of the visiting committee are not authorised to act singly in making the entries in the visitor's book and reporting to the board of guardians; but it is, nevertheless, competent for any single member to visit the workhouse on the appointed days if his colleagues should be absent on the occasion (*ibid.*). Any member of the visiting committee may visit the workhouse at any time at which the committee could visit it collectively, unless the guardians should have given the committee only a limited authority to visit it so as to confine that authority to a majority or any fixed number or proportion of the members of the committee (2 Off. Cir. 173).

By Article 2 of the General Order: Visitation of Workhouses, January 26, 1893—

any board of guardians may, if they think fit, from time to time, by resolution, appoint one or more committee or committees, consisting of persons of the female sex, whether members of the board of guardians or not, whose duty it shall be to visit and examine the parts of the workhouse or workhouses of the union or separate parish in which female paupers or pauper children are maintained, and to report to the board of guardians any matter which may appear to the committee to need attention. Provided that the proceeding, term of office, and duties of any such committee shall be subject to such rules and regulations as the board of guardians may from time to time prescribe. Provided also that the appointment of such a committee shall not in any way affect the duty of the board of guardians to appoint one or more visiting committees as required by the order now in force, nor the powers and duties of any such visiting committee. With reference to the above, the Local Government Board have said that the term "workhouse" is intended to include any infirmary, school, or other similar establishment in the occupation of the guardians (Cir. Letter, January 28, 1893).

A ratepayer cannot as of right visit and inspect the workhouse (4 Off. Cir. 96); but it is usual to allow those who are desirous of seeing the workhouse to do so. Any guardian may, however, at any time, visit and examine any part of any workhouse of the union or separate parish of which he is the guardian (General Order: Visitation of Workhouses, January 26, 1893).

The Local Government Board have recommended that accommodation be provided for the temporary detention of persons who are alleged to be lunatics, and are sent to the workhouse under secs. 20, 21 of the Lunacy Act, 1890, 53 & 54 Vict. c. 5. Sec. 5 (4) of the Prevention of Cruelty Act, 1904, 4 Edw. VII. c. 15, directs boards of guardians to provide for the reception of children brought to the workhouse in pursuance of that Act (see s. 5 (1)). The master is bound to receive children so brought [and they are to be detained in the workhouse until their case is decided; and any expenses incurred in respect of them are to be deemed expenses incurred in the relief of the poor (*ibid.*)]. As to the management of workhouses generally, see *In-door Relief, infra*.

In-door Relief.—The Local Government Board, in a circular-letter dated September 2, 1871, state that in numerous instances (to which they refer) the guardians disregard the advantages which result not only to the ratepayers, but to the poor themselves, from the offer of in-door in preference to out-door relief, and that some guardians are inclined to imagine that out-door relief is more economical than in-door, because an individual or family costs more in the workhouse than the amount of out-door relief which would be given in the particular case out of it. This, no doubt, may be so in an individual case, but the guardians should bear in mind that out-door relief multiplies so largely the number of applicants, that if relief were afforded to all, the cost of such relief would greatly exceed that of maintaining in the workhouse such of the applicants as would be willing to enter it, as it is found by practical experience that when the workhouse test is offered it is not accepted in more than one case in ten. Following sec. 38 of the 4 & 5 Will. IV. c. 76, the General Consolidated Order, July 24, 1847, by Article 152, declares that, subject to the rules and regulations therein

contained, the guidance, government, and control of every workhouse, and of the officers, servants, assistants, and paupers within the workhouse, shall be exercised by the guardians of the union.

With regard to the admission of paupers into the workhouse, it is provided by the order that every pauper who shall be admitted into the workhouse, either upon his first or any subsequent admission, shall be admitted in some one of the following modes only; that is to say:—

By a written or printed order of the board of guardians, signed by their clerk, according to Article 42.

By a provisional written or printed order, signed by a relieving officer or an overseer.

By the master of the workhouse (or, during his absence or inability to act, by the matron), without any order, in any case of sudden or urgent necessity.

Provided that the master may admit any pauper delivered at the workhouse under an order of removal to a parish or union (Art. 88). The justices may also order a child to be taken to the workhouse under sec. 19 of the Industrial Schools Act, 1866, [29 & 30 Vict. c. 118, or under the Elementary Education Act, 1876, 39 & 40 Vict. c. 79, s. 12; or the Industrial Schools Amendment Act, 1880, 43 & 44 Vict. c. 15. The police, under certain circumstances, may bring a child to the workhouse, and if there is room it must be taken in (Prevention of Cruelty to Children Act, 1904, 4 Edw. VII. c. 15)]. A person may be removed to the workhouse under the Lunacy Act, 1890, 53 & 54 Vict. c. 5.

It is to be observed, generally, with respect to all persons who may apply for admission into the workhouse under circumstances of urgent necessity, that their destitution, coupled with the fact of their being within the union or parish, entitles them to relief; and that their title to relief is altogether independent of their settlement (if they have one), which is a matter for subsequent inquiry, and only renders them liable to removal in consequence of their becoming chargeable (Inst. Letter, February 5, 1842). They should be admitted and discharged (but not during the performance of divine service) on Sundays and holidays the same as on other days. The master must also admit those who present a proper order, or who apply without one under urgent circumstances, at any time of night, but he is not in general bound to discharge a pauper in the night-time. With regard to paupers who are in the habit of frequently discharging themselves from workhouses, the guardians are, by sec. 4 of the 34 & 35 Vict. c. 108, empowered to direct that any pauper inmate of the workhouse, or the paupers of any class therein, shall not be entitled to discharge themselves until after the expiration of certain periods of notice of intention to quit the workhouse, not exceeding the following, that is to say:—

1. If the pauper has not previously discharged himself from the workhouse within one month before giving the notice, until after the expiration of twenty-four hours.

2. If he has discharged himself once or oftener within such month, until after the expiration of forty-eight hours.

3. If he has discharged himself more than twice within two months before giving the notice, until after seventy-two hours. The master has no authority to discharge a pauper from the workhouse against the pauper's wish, without directions from the board of guardians. A person suffering from mental disease or from bodily disease of an infectious or contagious character, may, on the advice of the medical officer, be

detained in the workhouse until the medical officer certifies that the discharge may take place (30 & 31 Vict. c. 106, s. 22). If, on searching a pauper, money sufficient for his present maintenance is found upon him, the master should take possession of it, and hand it over to the guardians at their next meeting (11 & 12 Vict. c. 110, s. 10; 12 and 13 Vict. c. 103, s. 16).

Overseers are authorised to give relief only in cases of "sudden and urgent necessity" (Poor Law Amendment Act, 1834, 4 & 5 Will. iv. c. 76, s. 54). The giving of an order for the workhouse amounts to relief; but such order is only operative until the next meeting of the guardians, and the master is not precluded from exercising his judgment as to the fact of the applicant being a pauper. If a pauper suffering from an infectious disease presents a provisional order for admission, he should be placed in the ward set apart for such cases (Art. 92); and if he cannot be separated from the other inmates, the master should at once send for the relieving officer, who is bound to find some temporary accommodation. No pauper must be admitted to a workhouse under any order mentioned in Article 88, if it bears date more than six days before the pauper presents it at the workhouse (Order, July 24, 1847, Art. 89).

If a pauper be admitted otherwise than by an order of the board of guardians, the admission of such pauper shall be brought before the board of guardians at their next ordinary meeting, who shall decide on the propriety of the pauper's continuing in the workhouse or otherwise, and make an order accordingly (*ibid.*, Art. 90). As soon as the pauper is admitted, he shall be placed in some room appropriated for paupers on admission, and shall then be examined by the medical officer (*ibid.*, Art. 91). If the medical officer upon such examination pronounce the pauper to be labouring under any disease of body or mind, the pauper shall be placed in the sick ward, or in such other ward as the medical officer shall direct (*ibid.*, Art. 92). The law does not, however, permit of any resort to compulsion to examine into the state of a sick pauper (being of sound mind) who refuses to allow an examination of his person to be made.

If the medical officer pronounce the pauper to be free from any such disease, the pauper shall be placed in the part of the workhouse assigned to the class to which he may belong (*ibid.*, Art. 93). No pauper shall be detained in a receiving ward for a longer time than is necessary for carrying into effect the regulations in Articles 91, 92, and 93 (*supra*), if there be room in the proper ward for his reception (*ibid.*, Art. 94). Before being removed from the receiving ward, the pauper shall be thoroughly cleansed, and shall be clothed in a workhouse dress, and the clothes which he wore at the time of his admission shall be purified, and deposited in a place appropriated for that purpose, with the pauper's name affixed thereto. Such clothes shall be restored to the pauper when he leaves the workhouse (*ibid.*, Art. 95). Every pauper shall, upon his admission into the workhouse, be searched by or under the inspection of the proper officer, and all articles prohibited by any Act of Parliament, or by this order, which may be found upon his person, shall be taken from him, and, so far as may be proper, restored to him at his departure from the workhouse (*ibid.*, Art. 96).

The adult male paupers ought to be searched by the porter; the female paupers and the children by the matron, or by some of the female servants under her direction (Arts. 214 (5), 210 (2)).

The following are examples of prohibited articles:—

1. Spirituous or fermented liquors (4 & 5 Will. iv. c. 76, ss. 92-94).
 2. Articles of food not allowed by the dietary [see the Dietary Order, October 10, 1900].

3. Letters or printed papers having an improper tendency (Art. 119).

4. Cards or dice (Art. 120).

5. Matches or highly combustible articles (Art. 121).

If the guardians or their officers should become aware that any pauper is possessed of money, or other available property sufficient for his maintenance, they would be justified in withholding relief from such pauper during the time that he is able to maintain himself; or they might proceed against him before a justice for being wilfully chargeable.

The guardians are not empowered to direct the hair of any adult pauper to be cut off under ordinary circumstances, but only in some extraordinary cases where such a proceeding may be necessary for the protection of the health of the inmates of the house; in no case will they be justified in forcibly cutting off the hair of adult female paupers of sane mind (cp. *Ford v. Skinner*, 1830, 4 Car. & P. 239).

A minute of instructions as to the bathing of workhouse inmates was issued by the Local Government Board on the 2nd February 1886. (See also 16th Annual Report, p. 1, Local Government Board.)

Paupers generally, so far as the workhouse admits thereof, shall be classed as follows:—

Class 1. Men infirm through age or any other cause.

Class 2. Able-bodied men and youths above the age of fifteen years.

Class 3. Boys above the age of seven years and under that of fifteen.

Class 4. Women infirm through age or any other cause.

Class 5. Able-bodied women and girls above the age of fifteen years.

Class 6. Girls above the age of seven years and under that of fifteen.

Class 7. Children under seven years of age; to each class shall be assigned that ward or separate building and yard which may be best fitted for the reception of such class, and each class of paupers shall remain therein, without communication with those of any other class (*ibid.*, Art. 98).

By sec. 26 of the 4 & 5 Will. iv. c. 76, the Local Government Board is empowered to issue such rules, orders, and regulations as they deem expedient for the classification of paupers in workhouses, [and in addition to such classification there is now required a further classification for dietary purposes of all inmates above the age of three years (Workhouse Regulation (Dietaries and Accounts) Order, dated October 10, 1900)]. Article 99 of the General Order of July 24, 1847, provides—

1st. That the guardians shall from time to time, after consulting the medical officer, make such arrangements as they may deem necessary with regard to persons labouring under any disease of body or mind.

2nd. The guardians shall, so far as circumstances will permit, further subdivide any of the classes enumerated in Article 89, with reference to the moral character or behaviour, or the previous habits of the inmates, or to such other grounds as may seem expedient. This is an important provision, enabling the guardians to place persons of bad character in classes by themselves, so that they may not contaminate the virtuous and well-conducted inmates of the house.

3rd. That nothing in this Order shall compel the guardians to separate any married couple, being both paupers of the first and fourth classes respectively, provided the guardians shall set apart for the exclusive use of every such couple a sleeping apartment separate

from that of the other paupers. The regulation, in consequence of which a husband and his wife are separated during their residence in the workhouse, has been by many persons considered objectionable. A regulation of this sort is required by the internal arrangements of a workhouse; for, in order that all married couples should live together in a workhouse, in a manner consistent with decency and propriety, it would be necessary not only that internal arrangements and discipline of workhouses should be altogether altered, but that their size and cost should be greatly increased. Aged married couples (whose residence in the workhouse is likely to be of longer duration than that of able-bodied persons), the guardians may (independently of the statutes above cited), by observing the forms prescribed in this proviso, place in a separate sleeping apartment. Moreover, the guardians can allow outdoor relief to any aged couple whom it may be inexpedient from any cause to retain in the workhouse (Inst. Letter, February 5, 1842). [See also Local Government Board Circular, dated August 4, 1900, on Cottage Homes.]

4th. That any paupers of the fifth and sixth classes may be employed constantly or occasionally in any of the female sick wards, or in the care of infants, or as assistants in the household work; and the master and matron shall make such arrangements as may enable the paupers of the fifth and sixth classes to be employed in the household work, without communication with the paupers of the second and third classes.

5th. That any pauper of the fourth class, whom the master may deem fit to perform any of the duties of a nurse or an assistant to the matron, may be so employed in the sick wards or those of the fourth, fifth, sixth, or seventh classes, and any pauper of the first class, who may by the master be deemed fit, may be placed in the ward of the third class, to aid in the management, and superintend the behaviour, of the paupers of such class, or may be employed in the male sick ward. [But see the General Order, August 6, 1897 (Nursing in Workhouse). By it the employment of paupers in the sick wards has been considerably restricted, and in any event the workhouse medical officer's consent to such employment is required.]

6th. That the guardians, for a special reason to be entered in their minutes, may place any boy or girl, between the ages of ten and sixteen years, in a male or female ward respectively, different from that to which he or she properly belongs, unless the Local Government Board shall otherwise direct.

7th. That the paupers of the seventh class may be placed in such of the wards appropriated to the female paupers as shall be deemed expedient, and the mothers of such paupers shall be permitted to have access to them at all reasonable times.

8th. That the master (subject to any directions given or regulations made by the guardians) shall allow the father or mother of any child in the same workhouse, who may be desirous of seeing such child, to have an interview with such child at some one time in each day, in a room in the said workhouse to be appointed for that purpose. And the guardians shall make arrangements for permitting the members of the same family who may be in different workhouses of the union to have occasional interviews with each other, at such times, and in such manner, as may best suit the discipline of the several workhouses.

Article 208 (14) requires the master to apprise the nearest relation in the workhouse of the sickness of any pauper; and by subs. 16 of the same article it is his duty to give immediate information of the

death of any pauper in the workhouse to the nearest relations of the deceased who may be known to him, and who may reside within a reasonable distance. Article 100 directs the guardians not to admit into the workhouse a greater number of paupers than it was built to contain, and in case that number should be at any time exceeded, the fact is to be forthwith reported to the Local Government Board by the clerk.

No pauper of unsound mind, who may be dangerous, or who may have been reported as such by the medical officer, or who may require habitual or frequent restraint, shall be detained in the workhouse for any period exceeding fourteen days, and the guardians shall cause the proper steps to be taken for the removal of every such pauper to some asylum or licensed house as soon as may be practicable (*ibid.*, Art. 101).

[By sec. 24 of the Lunacy Act, 1890, 53 & 54 Vict. c. 5 (as amended by sec. 4 of the Lunacy Act, 1891, 54 & 55 Vict. c. 65), except in the cases mentioned in the Act (ss. 20, 21, which relate to urgent cases dealt with by the police, and temporary removals to the workhouse pending future proceedings), no person is to be allowed to remain in a workhouse as a lunatic unless its medical officer certifies in writing—

(1) That such person is a lunatic, stating the grounds of his opinion;

(2) That the case is a proper one to be allowed to remain as a lunatic; and

(3) That the accommodation in the workhouse is sufficient for the lunatic's proper care and treatment separate from sane inmates, unless the medical officer certifies that the lunatic's condition is such that it is not necessary for the convenience of the lunatic or of the other inmates that he should be kept separate (Act of 1890, s. 24 (1)).

Such certificate authorises detention, even against the lunatic's will, for fourteen days (*ibid.*, s. 24 (2)).

If further detention is required, the relieving officer of the union must apply to a justice having local jurisdiction, fortifying his application with a certificate obtained from a medical practitioner not connected with the workhouse who has examined the lunatic, for an order of detention (*ibid.* (3) (4)).

The guardians must pay a reasonable fee to the examining doctor (*ibid.* (5)).

Where it is not desirable to retain the lunatic in the workhouse the medical officer must give notice in writing to one of the relieving officers of the union, who, with all other persons, will take the like proceedings and in the same time for the removal of a lunatic to an asylum as is provided in the case of a pauper deemed to be a lunatic and a proper person to be sent to an asylum. While these proceedings are in progress the lunatic may be detained in the workhouse (*ibid.* (6)).

In the case of a pauper lunatic discharged from an asylum, if its medical officer thinks the lunatic, though not fit to be at large, is a proper person to be kept in a workhouse, he may so certify, and the lunatic may, if proper arrangements can be made in the workhouse, be there detained against his will (*ibid.*, s. 25). See also *Twenty-First Annual Report, Local Government Board*, p. 112.]

All the paupers in the workhouse, except the sick and insane, and the paupers of the first, fourth, and seventh classes, shall rise, be set to work, leave off work, and go to bed at the times mentioned in the Form (N.), *infra*, and shall be allowed such intervals for their meals as are

therein stated, and these several times shall be notified by the ringing of a bell: Provided always, that the guardians may, with the consent of the Board, make such alterations in any of the said times or intervals, as the guardians may think fit (*ibid.*, Art. 102), but the Form times remain in force unless such alterations be made.

FORM (N.) (GENERAL ORDER, 1847).

	Time of Rising.	Interval for Breakfast.	Time for Work.	Interval for Dinner.	Time for Work.	Interval for Supper.	Time for going to Bed.
From 25th March to 29th Sept.	$\frac{1}{4}$ before 6	From $\frac{1}{2}$ past 6 to 7	From 7 to 12	From 12 to 1	From 1 to 6	From 6 to 7	8 o'clock
From 29th Sept. to 25th March	$\frac{1}{4}$ before 7	From $\frac{1}{2}$ past 7 to 8	From 8 to 12	From 12 to 1	From 1 to 6	From 6 to 7	8 o'clock

Half an hour after the bell shall have been rung for rising, the names of the paupers shall be called over by the master and matron respectively, in the several wards provided for the second, third, fifth, and sixth classes, when every pauper belonging to the respective wards shall be present, and shall answer to his name, and be inspected by the master and matron respectively, provided that the paupers of the third and sixth classes may be called over and inspected by the schoolmaster and school-mistress (*ibid.*, Art. 103).

The master and matron shall (subject to the directions of the guardians) fix the hours of rising and going to bed, for the paupers of the first, fourth, and seventh classes, and determine the occupation of which they may be capable; and the meals for such paupers shall be provided at such times and in such manner as the guardians may from time to time direct (*ibid.*, Art. 106). [In fixing such times the medical officer should be consulted (Inst. Letter, February 5, 1842).]

The meals shall be taken by all the paupers, except the sick, the children, persons of unsound mind, casual poor wayfarers, women suckling their children, and the paupers of the first and fourth classes, in the dining-hall or day-room, and in no other place whatever, and during the time of meals order and decorum shall be maintained (*ibid.*, Art. 104). No pauper of the second, third, fifth, or sixth classes shall go to, or remain in, his sleeping room, either in the time hereby appointed for work, or in the intervals allowed for meals, except by permission of the master or matron (*ibid.*, Art. 105).

[The inmates of a workhouse, above the age of three years, shall be classified and dieted in accordance with the regulations scheduled to the Workhouse Regulations (Dietaries and Accounts) Order, dated October 10, 1900. "Whilst one of the main objects sought by the order has been to secure greater uniformity in the nutritive value of the diets prescribed by the dietary tables in force throughout the several poor-law unions the board have endeavoured to give the boards of guardians a wide discretion in the selection of tables of dietaries appropriate to their respective workhouses" (*Thirtieth Annual Report, Local Government Board* (1900-01), p. 62; Cir. Letter, October 11, 1900).

The guardians frame dietary tables in consultation with the medical officer, and classify the inmates for the purpose. The medical officer is to advise on all suggested dietary tables. The tables when settled are signed by the chairman and clerk of the board, but do not require the consent of the Local Government Board. For each sex there are two tables—I. "Plain Diet," II. "Infirm Diet"—with certain subdivisions, the food in which is calculated according to the condition of health and the work to be done by the inmates. An average day's work with sustained exertion, *e.g.* corn-grinding, pumping, stone-breaking or crushing, shifting heavy goods, digging, scrubbing, washing, ironing, etc., puts the inmates into class 1A for men and 3A for women; while employment without sustained exertion, such as wood-chopping and bundling, hoeing or weeding, sorting light articles, sewing, etc., is classified 1 or 2A for men, 3 or 4A for women (see the classes *infra*).

Class 1. Men not employed in work (plain diet).

Class 1A. Men employed in work (as class 1, with additional meal on week-days only).

Class 2. Men not employed in work (infirm diet).

Class 2A. Men employed in work (as class 2, with additional meal on week-days only).

Class 2B (*a*). Feeble men (special infirm diet, with additional daily meal).

Class 3. Women not employed in work (plain diet).

Class 3A. Women employed in work (as class 3, with additional meal on week-days only).

Class 4. Women not employed in work (infirm diet).

Class 4A. Women employed in work (as class 4, with additional meal on week days only).

Class 4B (*a*). Feeble women (special infirm diet, with additional daily meal).

Class 5. Children over three and under eight (additional meal on week-days only).

Class 6. Children over eight and under sixteen (additional meal on week-days only).

The special infirm diet is intended for feeble inmates unable to consume the full amount of rations; it is essentially the same as ordinary infirm diet, but with reduced bulk of rations and a small extra allowance of milk and starch food. The object of this diet is to relieve the sick wards of persons formerly placed there to take advantage of special food (Art. 4 of the Order).

Children are to be fed according to appetite, and at the master's or matron's discretion, a little more or a little less than the average allowance is to be made to individuals, but these officials are responsible for seeing that each child receives a sufficient amount of food at each meal.

Children under three are dieted by the medical officer in accordance with the rules governing the service of food to the sick (Art. 5 of the Order).

For the sick the food (its preparation, service, and distribution) is under the control and subject to the orders of the medical officer (Art. 6 of the Order).

All foods are to be prepared in accordance with the ingredient tables attached to the Regulations of the Order (Art. 7 of the Order).

The following additional points may be noted :—

(1) The medical officer may direct in writing such diet for any individual pauper as he may deem necessary, and the master shall obey such direction until the next ordinary meeting of the guardians, when he shall report the same in writing to the guardians (*ibid.*, Art. 7).

(2) If the medical officer at any time certifies that he deems a temporary change in the diet essential to the health of the paupers in the workhouse, or of any class or classes thereof, the guardians shall cause a copy of such certificate to be entered on the minutes of their proceedings, and may forthwith order, by a resolution, the said diet to be temporarily changed, according to the recommendation of the medical officer, and shall forthwith transmit a copy of such certificate and resolution to the Commissioners (*ibid.*, Art. 9).

(3) If the medical officer considers the diet prescribed for (i.) persons of unsound mind; (ii.) women advanced in pregnancy; (iii.) women suckling infants; (iv.) infants under three years of age, unsuitable, he shall give directions in writing as to proper diet (*ibid.*, Art. 7).

(4) The guardians may not allow to any pauper fermented or spirituous liquors unless in pursuance of a written recommendation of the medical officer. The recommendation must be entered in the "Alcohol Book," accompanied by a statement of the reasons which, in the opinion of the medical officer, render such allowance requisite for the health of the inmate (*ibid.*, Art. 8).

(5) Pauper inmates may not perform nursing duties in the sick or lying-in ward of the workhouse, or otherwise may not nurse any pauper in the workhouse, and may only be employed as attendants in these wards with the consent of the medical officer and under the supervision of a paid official (General Order (Nursing of the Sick in Workhouses), August 6, 1897).]

(6) Tobacco or snuff may be allowed to such of the inmates of the workhouse, who are not able-bodied, or are employed upon work of a specially disagreeable character, as the guardians may consider should be supplied with the same, the quantity to be allowed in each case, or in any class of cases, to be such as the guardians may by resolution prescribe (General Order, November 3, 1892).

(7) The guardians may, if they think fit, cause dry tea, with sugar and milk, to be supplied to such of the female inmates of the workhouse as they may consider should be supplied with the same, the quantity to be allowed in each case, or in any class of cases, to be such as the guardians by resolution prescribe (General Order, Workhouse Regulations, March 6, 1894, Art. 1). The allowances authorised by the guardians are in addition to the tea prescribed by the dietary in force in the workhouse (Cir. Letter, March 10, 1894).

If any pauper require the master or matron to weigh the allowance of provisions served out at any meal, the master or matron shall forthwith weigh such allowance in the presence of the pauper complaining, and of two other persons (General Order, July 24, 1847, Art. 109).

The clothing to be worn by the paupers in the workhouse shall be made of such materials as the board of guardians may determine (*ibid.*, Art. 110).

The clothing worn by the paupers need not necessarily be uniform, either in colour or materials. It should be stamped with the name of the union, but not so as to be seen when worn. Sec. 2 of the 55

Geo. III. c. 137 provides that the stamp or mark shall not be placed on any articles of wearing apparel so as to be publicly visible on the exterior of the same.

With respect to the use of a penal dress in the workhouse, see *Poor Law Commissioners, Sixth Annual Report*, p. 98, which contains their reasons for disapproving of the practice of causing paupers to wear a distinguishing dress as a mark of disgrace.

More than two paupers, any one of whom is above the age of seven years, shall not be allowed to occupy the same bed, unless in the case of a mother and infant children (*ibid.*, Art. 111).

The paupers of the several classes shall be kept employed according to their capacity and ability; and no pauper shall receive any compensation for his labour (*ibid.*, Art. 112). Able-bodied paupers should not be put to mending parish roads (3 Off. Cir. 151). Needlework for sale is allowable (5 Off. Cir. 79); so is mat-making if it does not disturb trade in the neighbourhood (8 Off. Cir. 95); but boys may not be sent to work in a factory (9 Off. Cir. 64). See, generally, as to pauper labour interfering with the trade of a neighbourhood, *Eighteenth Annual Report, Local Government Board*, p. 104; Cir. Letter, dated October 31, 1888.

By Article 114, the boys and girls who are inmates of the workhouse shall for three of the working hours, at least, be instructed in reading, writing, arithmetic, etc.; [but this article has been practically superseded by the General Order of January 30, 1897, which regulates the school attendance of children in workhouses and poor-law schools, and the time which may be devoted to industrial training, or manual and industrial work. It is expressly provided in the order that nothing shall relieve the guardians or any child from any duty or liability imposed by the Elementary Education Acts].

Any pauper may quit the workhouse upon giving to the master, or (during his absence or inability to act) to the matron, a reasonable notice of his wish to do so; and in the event of any able-bodied pauper, having a family, so quitting the house, the whole of such family shall be sent with him, unless the guardians shall, for any special reason, otherwise direct; and such directions shall be in conformity with the regulations of the Local Government Board with respect to relief in force at the time (*ibid.*, Art. 115); [but a certain notice may be insisted upon if the pauper has previously discharged himself within a certain time of his request (34 & 35 Vict. c. 108, s. 4; 62 & 63 Vict. c. 37, s. 4), and see *ante*].

The Poor Law Commissioners expressed the opinion that the guardians and the master of the workhouse, as their officer, have over orphan children or children deserted by their parents, the same control which a guardian possesses over his ward; and that they may therefore detain in the workhouse any such infant under the age of sixteen, provided that they have reasonable grounds for believing that leaving the workhouse would be attended with injurious consequences to the child. The guardians however, are not authorised to detain in the workhouse young persons above sixteen years of age, who have no friends and are not going into service (Inst. Letter, February 5, 1842).

[The Poor Law Act, 1899, 62 & 63 Vict. c. 37, extends the powers of the guardians to acquire control over children maintained by them. Where a child is maintained by guardians, and (1) it has been deserted by its parent; (2) its parents' mode of life renders them unfit to have control of it; (3) the parent is in prison, or in an inebriate home; (4) the parent has been sentenced to imprisonment for the ill-treatment of

his children; (5) a parent is bed-ridden, disabled, or a pauper, and consents; (6) both parents—or, in the case of an illegitimate child, the mother—are dead, the guardians may resolve to stand *in loco parentis* to the child until it reaches the age of eighteen, and all the parents' rights and duties shall thereupon vest in the guardians. Such resolution may be rescinded if the guardians think the change would be of benefit to the child. A parent or guardian of a child may apply to a Court of summary jurisdiction to have the resolution rescinded and the custody of the child restored, and in making any order the Court will have regard to the interests of the child. Any person, directly or indirectly, taking or attempting to take such a child out of the custody of the guardians commits an offence. The guardians may allow such child to be adopted by foster-parents. The passing of a resolution vesting in themselves the rights of a parent, does not preclude the guardians from subsequently removing the child to the union in which it has a settlement (*Wantage Union v. Bristol Union*, [1907] 1 K. B. 68).]

The mother of a legitimate child or of an illegitimate child should, on leaving the workhouse, take her child with her. The mother of an illegitimate child has a natural right to its custody as against strangers (*R. v. Nash*, 1883, 10 Q. B. D. 454). But a putative father cannot as of right remove his bastard child from the custody of the guardians (*R. v. St. Mary Abbots, Kensington*, 1887, 51 J. P. 740). Where a woman refused to take her bastard child with her on quitting the workhouse, the Poor Law Board advised that the child should be sent out with the mother, and if she then left the child, it should be at once received back, and proceedings taken against the mother under the Vagrant Act, 1824, and the Poor Law Amendment Act, 1844 (7 Off. Cir. 160).

If the guardians are satisfied that any pauper will have sufficient means of support outside the workhouse, but the pauper refuses to be discharged, they may cause him to be put out, and, if necessary, may call in a constable for that purpose (9 Off. Cir. 112). [The position of the guardians with respect to a married woman in the workhouse with her husband and children is somewhat difficult. The Local Government Board recommend that if such a woman discharges herself repeatedly the husband and children be discharged also, unless the husband exercises his marital authority to retain the woman in the house, though on this point it appears to be the law that no husband can physically compel his wife to remain with him against her will (*R. v. Jackson*, [1891] 1 Q. B. 671).] Provided, nevertheless, that the guardians may, by any general or special direction, authorise the master to allow a pauper, without giving any such notice as is required in Article 115, to quit the workhouse, and to return after temporary absence only; and every such permission shall be reported by the master to the guardians at their next ordinary meeting (Order, July 24, 1847).

Provided also, that nothing in the Order shall prevent the master from allowing the paupers of each sex under the age of fifteen, subject to such restrictions as the guardians may impose, to quit the workhouse under the care and guidance of himself, or the matron, schoolmaster, schoolmistress, porter, or some of the assistants and servants of the workhouse, for the purpose of exercise (*ibid.*, Art. 117). By Article 212 (3) it is made the duty of the schoolmaster and schoolmistress to accompany the children on these occasions, unless the guardians should otherwise direct.

Any person may visit any pauper in the workhouse by permission of the master, or (in his absence) of the matron, subject to such conditions and restrictions as the guardians may prescribe; such interview shall take place in a room separate from the other inmates of the workhouse, and in the presence of the master, matron, or porter, except where a sick pauper is visited (*ibid.*, Art. 118), [when the room shall be free and no official present (4 Off. Cir. 176)].

No written or printed paper of an improper tendency, or which may be likely to produce insubordination, shall be allowed to circulate or be read aloud among the inmates of the workhouse (*ibid.*, Art. 119), [but the exchange of letters in ordinary course of post between inmates and their friends is not in any way to be interfered with. Letters may not be opened by the workhouse officials (3 Off. Cir. 160)].

No pauper shall play at cards or at any game of chance in the workhouse; and the master may take from any pauper, and keep, until his departure from the workhouse, any cards, dice, or other articles applicable to games of chance which may be in his possession (*ibid.*, Art. 120).

The guardians may from time to time, by resolution, determine in what rooms and at what times smoking shall be allowed, and no pauper shall smoke in the workhouse in any other room or at any other time than is so allowed (General Order, November 3, 1892). This Order rescinded Article 121 of the Order of July 24, 1847, which forbade smoking altogether.

Any licensed minister of the religious persuasion of an inmate of the workhouse, who may at any time in the day, on the request of any inmate, enter the workhouse for the purpose of affording religious assistance to him, or for the purpose of instructing his child or children in the principles of his religion, shall give such assistance or instruction so as not to interfere with the good order and discipline of the other inmates of the workhouse, and such religious assistance or instruction shall be strictly confined to inmates who are of the religious persuasion of such minister, and to the children of such inmates, except in the case in which the guardians may lawfully permit religious assistance and instruction to be given to any paupers who are Protestant dissenters by licensed ministers who are Protestant dissenters (*ibid.*, Art. 122).

By the 4 & 5 Will. iv. c. 76, s. 19, no inmate of any workhouse is obliged to attend any religious service which may be contrary to his religious principles, and any licensed minister of the religious persuasion of any inmate of such workhouse, may at all times of the day, on the request of such inmate, visit him for the purpose of affording religious assistance to such inmate, and also for the purpose of instructing his child or children in the principles of their religion.

By sec. 21 of the 31 & 32 Vict. c. 122, it is enacted that, subject to the regulations to be approved by the Local Government Board, every inmate may attend some place of worship within a convenient distance from the workhouse where a service according to his creed is not provided in the workhouse.

Any pauper, being an inmate of the workhouse, who shall neglect to observe such of the regulations in this Order as are applicable to him as such inmate—

- Or who shall make any noise when silence is ordered to be kept;
- Or shall use obscene or profane language;
- Or shall by word or deed insult or revile any person;

Or shall threaten to strike or to assault any person ;
 Or shall not duly cleanse his person ;
 Or shall refuse or neglect to work, after having been required to do so ;

Or shall pretend sickness ;
 Or shall play at cards or other game of chance ;
 Or shall refuse to go into his proper ward or yard, or shall enter or attempt to enter, without permission, the ward or yard appropriated to any class of paupers other than that to which he belongs ;

Or shall climb over any fence or boundary wall surrounding any portion of the workhouse premises, or shall attempt to leave the workhouse otherwise than through the ordinary entrance ;

Or shall misbehave in going to, at, or returning from public worship out of the workhouse, or at divine service or prayers in the workhouse ;

Or having received temporary leave of absence, and wearing the workhouse clothes, shall return to the workhouse after the appointed time of absence, without reasonable cause for the delay ;

Or shall wilfully disobey any lawful order of any officer of the workhouse ; shall be deemed disorderly (Order, July 24, 1847, Art. 127).

Any pauper, being an inmate of the workhouse, who shall, within seven days, repeat any one, or commit more than one, of the offences specified in Article 127—

Or who shall by word or deed insult or revile the master or matron, or any other officer of the workhouse, or any of the guardians ;

Or shall wilfully disobey any lawful order of the master or matron after such order shall have been repeated ;

Or shall unlawfully strike or otherwise unlawfully assault any person ;

Or shall wilfully or mischievously damage or soil any property whatsoever belonging to the guardians ;

Or shall wilfully waste or spoil any provisions, stock, tools, or materials for work belonging to the guardians ;

Or shall be drunk ;

Or shall act or write indecently or obscenely ;

Or shall wilfully disturb other persons at public worship out of the workhouse, or at divine service ; shall be deemed refractory (*ibid.*, Art. 128).

Article 129 gives the master power to punish a refractory pauper by substituting a prescribed limited diet for forty-eight hours ; and Article 130 enables the guardians to add twenty-four hours' confinement to the above.

If any offence, whereby a pauper becomes refractory under Article 128, be accompanied by any of the following circumstances of aggravation ; that is to say, if such pauper—

Persist in using violence against any person ;

Or persist in creating a noise or disturbance, so as to annoy other inmates ;

Or endeavour to excite others paupers to acts of insubordination ;

Or persist in acting indecently or obscenely in the presence of any other inmate ;

Or persist in mischievously breaking or damaging any goods or property of the guardians ;

the master may, without any direction of the guardians, immediately place such refractory pauper in confinement for any time not exceeding twelve hours; which confinement shall, however, be reckoned as part of any punishment afterwards imposed by the guardians for the same offence (*ibid.*, Art. 131).

[Wilful disobedience of a lawful order of a workhouse official is not necessarily misbehaviour within the meaning of sec. 5 of the Poor Relief Act, 1815 (*Mile End Guardians v. Sims*, [1905] 2 K. B. 200).]

No child under twelve years of age shall be punished by confinement in a dark room or during the night (*ibid.*, Art. 136).

No corporal punishment shall be inflicted on any male child, except by the schoolmaster or master (*ibid.*, Art. 137). No corporal punishment shall be inflicted on any female child (*ibid.*, Art. 138). No corporal punishment shall be inflicted on any male child, except with a rod or other instrument, such as may have been approved of by the guardians or the visiting committee (*ibid.*, Art. 139). No corporal punishment shall be inflicted on any male child until two hours shall have elapsed from the commission of the offence for which such punishment is inflicted (*ibid.*, Art. 140). Whenever any male child is punished by corporal correction, the master and schoolmaster shall (if possible) be both present (*ibid.*, Art. 141). No male child shall be punished by flogging whose age may be reasonably supposed to exceed fourteen years (*ibid.*, Art. 142).

The record which is directed by the following article to be kept is of the utmost importance for the prevention of abuse. The details of offences and punishments must be accurately and punctually entered in the book; and if any case should not be properly reported, it will be presumed the omission originates in a sense of the expediency or concealment (Inst. Letter, February 5, 1842).

Article 143. The master shall keep a book to be furnished him by the guardians, in the prescribed form in which he shall duly enter—

1st. All cases of refractory or disorderly paupers, whether children or adults, reported to the guardians for their decision thereon.

2nd. All cases of paupers, whether children or adults, who may have been punished without the direction of the guardians, with the particulars of their respective offences and punishments.

The person who punishes any child with corporal correction shall forthwith report to the master the particulars of the offence and punishment; and the master shall enter the same in the book specified in Article 143 (*ibid.*, Art. 144).

Such book shall be laid on the table at every ordinary meeting of the guardians; and every entry made in such book since the last ordinary meeting shall be read to the board by the clerk (*ibid.*, Art. 145).

If any pauper above the age of fourteen years unlawfully introduce or attempt to introduce any spirituous or fermented liquor into the workhouse, or abscond from the workhouse with clothes belonging to the guardians, the master may cause such pauper to be forthwith taken before a justice of the peace, to be dealt with according to law. And whether he do so or not, he shall report every such case to the guardians at their next meeting (*ibid.*, Art. 146). By the 4 & 5 Will. IV. c. 76 s. 92, any person introducing or attempting to introduce spirituous liquors into a workhouse may be apprehended by the master or some one acting under his direction, and brought before a justice of the peace

and upon conviction may be fined, not exceeding £10, and in default imprisoned for not more than two calendar months. The 55 Geo. III. c. 137, s. 2, provides that if any person or persons shall run away from any workhouse and carry with him any clothes, etc., the property of the guardians, such person may be apprehended and brought before a justice of the peace, and, upon conviction, be sentenced to three months' imprisonment.

The master shall cause a legible copy of Articles 127-131 to be kept suspended in the dining-hall of the workhouse, or in the room in which the inmates usually eat their meals, and also in the board-room of the guardians (Order, July 24, 1847, Art. 147).

Casual Paupers.—The term "casual pauper" means any destitute wayfarer or wanderer applying for or receiving relief (General Order, December 18, 1882; 34 & 35 Vict. c. 108, s. 3).

It has been pointed out by the then Poor Law Board in an Instructional Letter, dated November 28, 1868, that it is of the utmost importance that there should be a sound and vigilant discrimination as regards those who apply for relief as casual poor, with a view to distinguish between those who are really destitute and those who, not being destitute, throw themselves habitually on the rates or on private charity. With this object in view, arrangements have been made in many parts of the country with the police to act as assistant relieving officer of vagrants. The advantages of this course seem to be that the professional tramp is comparatively unwilling to confront such an officer, while to the honest but destitute wayfarer his inquiries occasion no alarm.

In consequence of the passing of the Casual Poor Act, 1882, the Local Government Board issued a General Order, dated December 18, 1882, Article 3 of which provides that a casual pauper shall not be admitted into any casual ward except upon an order signed either by a relieving officer or assistant relieving officer, or, in cases of sudden and urgent necessity, by an overseer. Provided—1. The master of the workhouse (or during his absence or inability to act, the matron) or the superintendent of the casual ward shall admit any casual pauper without an order, where the case appears to be one of sudden or urgent necessity.

2. The master or matron of any workhouse or the superintendent of any casual ward in the metropolis shall admit without an order any person brought to the casual ward by a constable, in pursuance of sec. 4 of the Metropolitan Houseless Poor Act, 1865, if there be room for him in such ward. [The fact of an applicant being brought by a policeman is *prima facie* evidence of urgent necessity (Inst. Letter, February 5, 1842).]

3. Where a person is refused admission to a casual ward, a record of the name of applicant and of the circumstances under which he was refused admission shall be entered by the master, matron, or superintendent in a book, and laid before the guardians at their next meeting.

By sec. 4 of the Metropolitan Houseless Poor Act, 1865, any constable of the metropolitan police, or of the police of the City of London, may conduct any destitute person or wayfarer, who has not, to the constable's knowledge, committed any punishable offence, to the wards or other places of reception approved by the Local Government Board.

The following regulations, subject, however, as regards the metro-

polis, to the provisions of secs. 4 and 5 of the Metropolitan Houseless Poor Act, 1865, shall be observed with respect to orders of admission:—

1. The order shall, in addition to any other particulars that may be required, show the hour and place at which it was given;

2. The order shall be available only on the day on which it was issued;

3. The order shall not be available for admission earlier than four o'clock in the afternoon during the months between October and March, both inclusive, or earlier than six o'clock in the afternoon during the months between April and September, both inclusive, nor unless it has been presented within a reasonable time after it has been obtained, except where at the time of the presentation of the order the master or matron of the workhouse or the superintendent of the workhouse may consider the case to be one of sudden or urgent necessity (Order, December 18, 1882, Art. 4).

Whenever the workhouse or casual wards are full, the master should inform all applicants for admission of the address of the relieving officer. Article 5 provides for the search of every casual pauper on admission. Money found on a casual pauper is to be applied to the common fund of the union (Poor Law Amendment Act, 1848, s. 10).

Every casual pauper shall, as soon as practicable after his admission, be cleansed in a bath with water of suitable temperature: Provided that this regulation shall not be enforced if, on account of the state of health of the pauper or other circumstances, there is reason to believe that the use of the bath would be injurious (Order, January 28, 1882, Art. 6).

The clothing worn by a casual pauper shall, after his admission, be taken from him, and if requisite be dried or disinfected, and such garment or garments as the guardians may deem necessary shall be supplied to him for the night, his own clothes being returned to him in the morning (*ibid.*, Art. 7).

The master of the workhouse or the superintendent of the casual ward shall duly keep, or cause to be kept, a book containing the particulars set forth in the form in Sched. A. annexed to the order, and such other particulars as may be required by the guardians; and such book shall be laid before the guardians at such times as they may appoint, and shall be submitted to the district auditor at the usual audits, and at other audits when required by him (*ibid.*, Art. 8).

A casual pauper is not entitled to discharge himself from a casual ward before nine o'clock in the morning of the second day following his admission, nor before he has performed the work prescribed for him. If he has been admitted on more than one occasion during one month into any casual ward of the same union, he is not entitled to discharge himself until nine o'clock in the morning of the fourth day after his admission.

Provided—(1) The guardians may give any directions to the master of the workhouse, or to the superintendent of the casual ward, with respect to the discharge of any class or classes of casual paupers before the expiration of the respective periods specified in the section above cited, and such directions shall be followed by the master or superintendent.

(2) If in the opinion of the master of the workhouse, or the superintendent of the casual ward, any special circumstances shall require that a casual pauper shall be discharged before the expiration of either of the periods mentioned in the section above cited, he may discharge such pauper

accordingly, and shall report the facts of the case to the guardians at their next meeting (*ibid.*, Art. 9; sec. 4, Casual Poor Act, 1882).

(3) The above provisos have been amended by the addition thereto of the following proviso:—A casual pauper, who has been detained for more than one night, and who represents to the master of the workhouse or the superintendent of the casual ward that he is desirous of seeking work, shall, if he has to the best of his ability performed the prescribed task of work, be allowed to discharge himself at the time hereinafter mentioned on the day upon which he is discharged—that is to say, during the period from Lady Day to Michaelmas Day, half-past five o'clock in the morning; and during the rest of the year at half-past six o'clock in the morning (General Order, June 11, 1892).

The dietaries for casual paupers are prescribed by the General Order, December 18, 1882, Article 10; the General Orders (Metropolis) Dietary of Casual Paupers, November 3, 1887; [May 4, 1897, the latter of which allows more food to children], and the task of work to be performed by them by Article 11 of the Order of 1882; [but no person is to be required to perform the whole or any part of any allotted task if it appears that the same is not suited to his age, strength, or capacity (Inst. Letter, December 18, 1882; *Twelfth Annual Report, Local Government Board*, p. 62)].

Disobedience to the regulations constitutes the pauper an idle and disorderly person within the meaning of sec. 3 of the 5 Geo. IV. c. 83, and he may be dealt with accordingly.

Sec. 7 of the Pauper Inmates Discharge and Regulation Act, 1871, 34 & 35 Vict. c. 108, provides that any pauper who—(1) Absconds or escapes from or leaves any casual ward before he is entitled to discharge himself therefrom; or

(2) Refuses to be removed to any workhouse or asylum under the provisions of this Act; or

(3) Absconds or escapes from or leaves any workhouse or asylum during the period for which he may be detained therein; or

(4) Wilfully gives a false name or makes a false statement for the purpose of obtaining relief;

[And by Article 12 of the Order of 1882, who speaks or acts profanely, indecently, or obscenely, or who by word or deed insults or reviles, or threatens to strike or assault workhouse officials, or who unlawfully assaults or strikes any person, or who smokes in the casual ward,]

shall be deemed an idle and disorderly person within the meaning of sec. 3 of the 5 Geo. IV. c. 83.

And every pauper who—(1) Commits any of the offences before mentioned, after having been previously convicted as an idle and disorderly person; or

(2) Wilfully destroys or injures his own clothes, or damages any property of the guardians, shall be deemed a rogue and a vagabond within the meaning of sec. 4 of the same Act.

[In the event of the illness of a pauper the medical officer should be at once summoned, and, if he so directs, the patient must be transferred to the sick ward of the workhouse and be deemed an ordinary inmate thereof (Order of 1882, Art. 13). In the case of infectious disease there should be removal to a hospital provided by the local authority under the Public Health Acts; and if the case is one of small-pox, all people who have come in contact with it should be

vaccinated (*Twenty-third Annual Report, Local Government Board*, p. 63).]

Sec. 44 of the Divided Parishes and Poor Law Amendment Act, 1876, 39 & 40 Vict. c. 61, provides that the word "pauper" in the 34 & 35 Vict. c. 108, s. 7 (5), shall include any person who shall obtain relief by wilfully giving a false name, or making a false statement, and such person may be proceeded against as an idle and disorderly person at any time while he continues to receive such relief.

Sec. 5 of the Casual Poor Act, 1882, 45 & 46 Vict. c. 36, provides that if a person, for the purpose of obtaining relief, either for himself or any other person, wilfully gives a false name, or makes a false statement, to the guardians or their officers, he shall be deemed an idle and disorderly person within the meaning of sec. 3 of the Act 5 Geo. IV. c. 83.

[*Bastard Children*.—If an illegitimate child is chargeable to the Union, and the putative father is paying to the mother under a bastardy order, the guardians are entitled to the payments, and can charge them (Bastardy Laws Amendment Act, 1872, 35 & 36 Vict. c. 65, s. 7). Sec. 5 of the Bastardy Laws Amendment Act, 1873, 36 Vict. c. 9, enables guardians to obtain an order against the putative father of a bastard child to pay or contribute towards the relief of such child while chargeable. Costs may be awarded by the justices (Divided Parishes and Poor Law Amendment Act, 1876, 39 & 40 Vict. c. 61, s. 24).]

OUT-DOOR RELIEF.

General Rules.—Out-door relief, as the term implies, is the relief given by the guardians to persons who are not compelled to live in the workhouse. Out-door relief may not lawfully be given to every person entitled to relief from the rates, but is restricted to certain cases, as will be seen later on.

The regulations as to the administration of out-door relief are contained in the Out-door Relief Prohibitory Order, December 21, 1844, and the Out-door Relief Regulation Order, December 14, 1852. The first of these orders prescribes the following regulations:—

By Article 1, every able-bodied person, male or female, requiring relief from any parish within any of the said unions, shall be relieved wholly in the workhouse of the union, together with such of the family of every such able-bodied person as may be resident with him or her, and may not be in employment, and together with the wife of every such able-bodied male person, if he be a married man, and if she be resident with him, save and except in the following cases:—

1st. Where such person shall require relief on account of sudden and urgent necessity.

The words "sudden and urgent necessity" are understood to mean any case of destitution requiring instant relief. This exception does not authorise permanent out-door relief in any case. A case originally of sudden and urgent necessity, which subsequently requires continued relief, loses its character of suddenness and urgency. The relief subsequently required will be either ordinary relief, and therefore to be given in the workhouse, or it may be extraordinary, and given, for example, under the second exception to Article 1 (*infra*). The overseers, by the enactment above referred to, are empowered to give

temporary out-door relief in a case of sudden and urgent necessity (see p. 165).

2nd. When such person shall require relief on account of any sickness, accident, or bodily or mental infirmity affecting such person or any of his or her family.

This provides for the case of any able-bodied man who is himself insane, or temporarily sick, or who has met with an accident, or any of whose family required to be relieved on the ground of insanity, infirmity, accident, or sickness (Inst. Letter, December 21, 1844). The case of a woman who is actually confined in child-birth, will be a case of sickness coming within this exception. In the case of a domestic servant becoming ill, and requiring the service of the union medical officer, the Poor Law Board expressed the opinion that the guardians or their officers should narrowly investigate the circumstances of every case in which their interference is requested (7 Off. Cir. 297).

3rd. Where such person shall require relief for the purpose of defraying the expenses, either wholly or in part, of the burial of any of his or her family.

Relief may be given to able-bodied persons for the funerals of any members of their families, without requiring them to come into the workhouse (Inst. Letter, December 21, 1844). As to the burial of paupers, see p. 269.

4th. Where such person, being a widow, shall be in the first six months of her widowhood.

The exception of widows during the first six months of their widowhood is adopted with a view of making such arrangements for their support as their altered condition may require (Inst. Letter, December 21, 1844; see also 9 & 10 Vict. c. 66, s. 2). The exception refers to all widows, whether they come within the next exception or not. If an able-bodied widow have no child or children dependent upon her for support, out-door relief cannot be granted to her beyond the six months named in this article, without the previous consent of the Local Government Board, obtained under Article 6 (*infra*).

5th. Where such person shall be a widow, and have a legitimate child or children, dependent upon her, and incapable of earning his, her, or their livelihood, and have no illegitimate child born after the commencement of her widowhood.

The exception of widows with children, so far as it relates to able-bodied widows in employment, is one respecting which the guardians ought to exercise great circumspection in applying it in practice. The guardians, when administering relief under it, ought to take into account that when small weekly allowances in aid of wages are made, they too commonly serve to excuse relatives from the payments of contributions to a larger amount, and that the out-door allowance, when given indiscriminately in widowhood, tends to put an end to provident habits, in respect of insurances, joining sick clubs, or otherwise. It should, moreover, be borne in mind, that allowances made by the parish to able-bodied widows in employment do not always confer the advantages intended, inasmuch as their wages, as in the case of able-bodied men, are often reduced in consideration of the allowance from the parish; and that such reduction of wages, combined with the excuse furnished to relatives or friends for withholding their contributions, together with the pauper habits thus engendered, often renders such allowances to widows in aid of wages an injury rather than a benefit to them; whilst in some districts

this class of able-bodied widows may be so numerous that their labour thus depreciated at the expense of the ratepayers may be substituted for the more highly paid labour of independent labourers. It only seems necessary to observe further, in reference to this exception, that if a woman after her widowhood has an illegitimate child, her case will no longer be within the exception; but if the illegitimate child should afterwards die, her case will again fall within the exception, and the guardians will be at liberty to give her out-door relief if they think fit so to do. But note the omission "dependent upon her," in the last part of the exception. If a widow have an illegitimate child not dependent upon her, and legitimate children who are dependent upon her, her case will come within the exception so long as the illegitimate child lives. The Local Government Board recommend that in the case of any able-bodied widow with more than one child, it may be desirable to take one or more of the children into the workhouse in preference to giving out-door relief, and that out-door relief should not be given to an able-bodied widow with one child (Circ. Letter, December 2, 1871).

6th. Where such person shall be confined in any gaol or place of safe custody, subject always to the regulations contained in Article 4 (*infra*).

7th. Where such person shall be the wife or child of any able-bodied man who shall be in the service of His Majesty as a soldier, sailor, or marine.

With reference to the relief of the families of men serving in the militia, the Poor Law Board in 1854 expressed the following opinion:—

"No doubt the men are bound to support their wives and families out of their pay or means, so far as these can be made available for the purpose. The material consideration for the guardians, therefore, seems to be whether or not the pay which a militiaman while on duty receives is sufficient, after providing for his own wants and such necessary expenses as the proper discharge of his public duties entail upon him, to support his family. If it be not sufficient, the Board consider that the guardians cannot properly refuse, when application for relief is made by the wife, to grant such relief as the actual necessities of the family may, in the opinion of the guardians, render needful. . . . It is in the discretion of the guardians to grant out-door relief if they think it desirable to do so." See also *Soldiers*, *ante*, p. 228.

8th. Where any able-bodied person, not being a soldier, sailor, or marine, shall not reside within the union, but the wife, child, or children of such person shall reside within the same, the board of guardians of the union, according to their discretion, may, subject to the regulation contained in Article 4, afford relief in the workhouse to such wife, child, or children, or may allow out-door relief for any such child or children being within the age of nurture, and resident with the mother within the union.

This provides for the case of a wife whose husband is absent from her either by desertion or otherwise, and is necessary in consequence of the law applicable to women thus situated. It had been held that in such cases relief to the children was not relief to the wife; consequently, the wife could not be compelled to come with her children into the workhouse, although a new provision has been made by the Poor Law Amendment Act, 1844, 7 & 8 Vict. c. 101, s. 25, in respect of certain women separated from their husbands. If, however, under any circumstances, she requires relief for herself, the guardians may require her to

receive it in the workhouse, whether she do or do not come into the workhouse. As regards, however, children under the age of nurture, who may be living with the mother, the guardians cannot remove them from her; so that if she requires relief for them and them only, the guardians must, except in the case provided for by Article 4, give out-door relief, if relief be necessary (Inst. Letter, December 21, 1844). The age of nurture here referred to is seven years. Such a child cannot be removed from its parent, though it may have a different settlement and though the parent consent (*R. v. Birmingham*, 1843, 13 L. J. M. C. 1; 7 J. P. 705). When the mother of such a child is removed, the child must be removed with her. [The child's name should not be included in the order of removal, otherwise this would operate as conclusive evidence of its settlement.]

By the 4 & 5 Will. IV. c. 76, s. 56, the relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind, or deaf and dumb, shall be considered as given to the husband of such wife or to the father of such children, as the case may be. By the 57th section of the same Act, every man who shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to, or on account of, such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother; and such child or children shall be deemed a part of the husband's family.

By Article 2 of the Order of 1844, in every case in which out-door relief shall be given on account of sickness, accident, or infirmity to any able-bodied male person resident within any of the said unions, or to any member of the family of any able-bodied male person, an extract from the medical officer's weekly report (if any such officer shall have attended the case), stating the nature of such sickness, accident, or infirmity, shall be specially entered into the minutes of the proceedings of the board of guardians of the day on which the relief is ordered or subsequently allowed. But if the board of guardians shall think fit, a certificate under the hand of a medical officer of the union, or of the medical practitioner in attendance on the party, shall be laid before the board, stating the nature of such sickness, accident, or infirmity, and a copy of the same shall be in like manner entered in the minutes.

[In granting out-door relief to a member of any friendly society the guardians shall not take into consideration any sum received from such friendly society as sick pay except in so far as such sum shall exceed 5s. per week (Out-door Relief (Friendly Societies) Act, 1904, 4 Edw. VII. c. 32).]

By Article 3, no relief shall be given from the poor-rates of any parish comprised in any of the said unions to any person who does not reside in some place within the union, save and except in the following cases:—

1st. Where such person, being casually within such parish, shall become destitute.

This exception is introduced to meet the case of vagrants who become casually destitute within the union, and it is the duty of the guardians to relieve persons so situated without reference to the place of their settlement or residence (Inst. Letter, December 21, 1844).

2nd. Where such person shall require relief on account of any sickness, accident, or bodily or mental infirmity affecting such person, or any of his or her family.

3rd. Where such person shall be entitled to receive relief from any parish in which he or she may not be resident, under any order which justices may by law be authorised to make.

This exception is intended expressly to except from the operation of the order the cases of relief given to non-resident lunatics in asylums under orders of justices and to persons under orders of removal (Inst. Letter, December 21, 1844).

4th. Where such person, being a widow, shall be in the first six months of her widowhood.

This exception is similar to the fourth exception to Article 1, the reasons for which have been stated already (see *ante*, p. 250). With reference to this exception, it is necessary to bear in mind the provisions of the 9 & 10 Vict. c. 66, s. 2, which makes a widow irremovable, and, consequently, chargeable to the union in which she is residing for one year after her husband's death, provided she was living with him at the time of his death, and has not afterwards changed her residence. In such a case the guardians cannot lawfully grant non-resident relief, and the statute consequently overrides this exception. The case of a person who is a widow in a constructive sense, under the 7 & 8 Vict. c. 101, s. 25, does not come within this exception. The exception refers to the husband's death, and, therefore, it applies only to those who are widows in fact.

5th. Where such person is a widow, who has a legitimate child dependent on her for support, and no illegitimate child born after the commencement of her widowhood, and who at the time of her husband's death was resident with him in some place other than the parish of her legal settlement, and not situated in the union in which such parish may be comprised.

By the 7 & 8 Vict. c. 101, s. 26, "in the same case of any person being a widow having a legitimate child dependent on her for support, and no illegitimate child born after the commencement of her widowhood, and who at the time of her husband's death was resident with him in some place other than the parish of her legal settlement, and not situated in any union in which such parish is comprised, it shall be lawful for the guardians of such parish or union, if they see fit, to grant relief to such widow although not residing in such union or parish." Upon this the Poor Law Commissioners, in a circular dated the 17th October 1844, observe— That the widow must have been resident with her husband at the time of his death, not only out of the parish of her settlement, but also out of the union in which that parish may be comprised. The object of the clause appears to be to avoid the disturbance of those connections and mode of life at a distance from the union to which the family may have been accustomed, and which existed at the time of the husband's death. Where all the conditions exist which would enable the guardians to grant non-resident relief, they are still to use their discretion as to whether non-resident relief to the widow is in each particular case desirable. The general objection to such relief, such as the difficulty of ascertaining the circumstances of paupers beyond the power of inspection of the guardians or their officers, and the further difficulties attendant on the transmission of relief to places where the guardians have no authority and no official

agency, will be weighed by the guardians. It must be borne in mind by guardians and their officers, that they are in no wise exempted from their previous obligation to relieve any widow who may be in the parish or union requiring relief by the power thus given to the guardians of the place of her settlement to afford her non-resident relief. And even when that power is exerted, if, notwithstanding the relief sent to her by her parish, she or her children require additional or further relief, the officers of the place where she is are still bound, as heretofore, to afford her the relief which the circumstances require (4 Off. Cir. 147).

6th. Where such person shall be a child under the age of sixteen maintained in a workhouse or establishment for the education of pauper children not situate within the union.

This removes the restriction upon the guardians from sending children to a workhouse or establishment for the training of pauper children which may be situated out of their union, where, but for the prohibition of relief to non-residence contained in the order, they might lawfully do so.

This exception in Article 3 also applies to children sent to certified establishments for the instruction of the blind, deaf, dumb, lame, deformed, or idiotic persons.

[The power of guardians over children under eighteen years of age deserted by their parents, or possessing parents unfit to control them, is greatly extended by the Poor Law Act, 1899, 62 & 63 Vict. c. 37. See *ante*, p. 242.]

7th. Where such person shall be the wife or child, residing within the union, of some person not able-bodied, and not residing within the union.

Guardians are thus enabled to relieve the resident family of a non-resident man, provided he is not able-bodied, without requiring them to come into the workhouse (Inst. Letter, December 21, 1844).

8th. Where such person shall have been in the receipt of relief from some parish in the union from which such person seeks relief, at some time within the twelve calendar months next preceding the date of that one of the several orders hereinbefore recited, which was applicable to that union, being settled in such parish, and not being resident within the union at the time of the allowance of the relief.

This exception is practically spent by the effluxion of time.

Where the husband of any woman is beyond the seas, or in custody of the law, or in confinement in a licensed house or asylum as a lunatic or idiot, all relief which the guardians shall give to his wife, or her child or children, shall be given to such woman in the same manner and subject to the same conditions as if she were a widow (Art. 4). This article was introduced in conformity with the provision contained in the 7 & 8 Vict. c. 101, s. 25, in regard to the relief of women separated from their husbands, in certain cases particularly specified, who are by that provision to be treated as widows in respect to relief to be afforded to them by guardians. In the Circular-Letter of the 17th October 1884, on this subject, the Poor Law Commissioners remark: "Married women, whose children required and received relief, were not, before the passing of this Act, liable to any conditions in respect of such relief, and could cast off their children, however well such women might be able to maintain their children, or to contribute to their maintenance. Widows, on the other hand, were liable to the like conditions and consequences of relief afforded to themselves and their children, as the fathers of legitimate children are."

The present Act declares that while the husband of any woman is beyond the seas (that is, out of Great Britain), or in custody of the law, or in confinement in any licensed house or asylum as a lunatic or idiot, all relief given to the wife, or to her child or children, shall, notwithstanding her coverture, be given to her in the same manner and subject to the same conditions as if she were a widow (s. 25). And, again, "where widows are obliged to receive relief for their children within the union, or within the workhouse, these married women will be subject to the like conditions."

By the Divided Parishes and Poor Law Amendment Act, 1876, s. 18, it is provided that the provision contained in the Poor Law Amendment Act, 1844, 7 & 8 Vict. c. 101, s. 25, relating to relief, whereby relief to a woman whose husband appears to be beyond the seas is to be given to her in the same manner and subject to the same conditions as if she were a widow, is to apply to a married woman living separate from her husband. The effect of this article is to enable the guardians to exercise a discretion as to whether they will give in- or out-door relief in such cases, in like manner as they are empowered to do in the cases of widows. The guardians may, therefore, if they think fit, decline to relieve the wife and children, except in the workhouse, unless under the following circumstances:—Where the children are under the age of nurture, and relief is applied for on their account only, and the guardians are satisfied that the relief is required for them alone and not for the parent—in which case, as the guardians cannot legally separate the children from their mothers, the Poor Law Board apprehended that the guardians would be obliged to give out-door relief to the extent of the maintenance of such children (10 Off. Cir. 109). As to relief by a married woman, see p. 227.

It shall not be lawful for the guardians, or any of their officers, or for the overseer or overseers of any parish in the union, to pay, wholly or in part, the rent of the house or lodging of any pauper, or to apply any portion of the relief ordered to be given to any pauper in payment of any such rent, or to retain any portion of such relief for the purpose of directly or indirectly discharging such rent, in full or in part, for any such pauper. Provided always that nothing in this article contained shall apply to any shelter or temporary lodging, procured in any case of sudden and urgent necessity, or mental imbecility, or shall be taken to prevent the said guardians, in regulating the amount of relief to be afforded to any particular person, from considering the expenses to be incurred by such person in providing lodging (Art. 5). This article is intended to prevent a practice which prevailed in some parts of the country, whereby the poor-rates have been made a fund for the payment of rents directly to the landlords. In all cases where the pauper is so far destitute as to require a lodging, or the means of paying for one, if the guardians do not deem it expedient in the particular case to require the party to come into the workhouse, they should supply to the pauper the means of paying for such lodging.

Provided always that in case the guardians of any of the said unions depart in any particular instance from any of the regulations hereinbefore contained, and within fifteen days after such departure report the same, and the grounds thereof, to the (Local Government) Board, and the (Local Government) Board approve of such departure, then the relief granted in such particular instance shall, if otherwise lawful, not be deemed to be unlawful, or be subject to be disallowed (Art. 6).

Relief to Pensioners.—The repayment of relief given to out-pensioners of Greenwich and Chelsea Hospitals, and lunatic pensioners, was formerly obtainable in a manner specially provided under 19 & 20 Vict. c. 15, ss. 8, 9; but these sections have now been repealed, and the guardians in giving relief must take into account the fact that frequently pensions cease upon persons becoming chargeable to the Union. According to the Greenwich Hospital Regulations no payment of pension money can be made to a recipient who is an inmate of a workhouse or asylum, or is otherwise chargeable to the rates (Cir. Letter, June 12, 1906).

No relief which may be contrary to any regulation in this Order shall be given by way of loan; and any relief which may be given to, or on account of any person above the age of twenty-one, or to his wife, or any part of his or her family under the age of sixteen, under Article 1, or any of the exceptions thereto, or under any of the exceptions to Article 3, or under Article 4, or under the proviso in Article 6, may, if the guardians think fit, be given by way of loan (Art. 7). As to relief by way of loan, see *post*, p. 265.

The next order with reference to the regulation of out-door relief is dated the 14th December 1852, and applies principally to urban unions, and to a few unions which had not at that time provided adequate workhouse accommodation.

Payments in kind.—Whenever the guardians allow relief to any able-bodied male person out of the workhouse, one-half at least of the relief so allowed shall be given in articles of food or fuel, or in other articles of absolute necessity (Art. 1).

In any case in which the guardians allow relief for a longer period than one week to an indigent poor person resident within their union or parish respectively, without requiring that such person shall be received into the workhouse, such relief shall be given or administered weekly, or at such more frequent periods as they may deem expedient (Art. 2). The object of the Board in this article was mainly to save poor persons in the receipt of relief from being exposed to the temptation of expending at once money given to them beyond their present necessities (Inst. Letter, August 25, 1852).

Out-door relief should be granted for a fixed period only. The period should not in any case exceed three months. All orders to able-bodied men for relief in the labour yard should be given only from week to week (*First Annual Report, Local Government Board*, p. 63).

By Article 3, it shall not be lawful for the guardians or their officers—

To establish any applicant for relief in trade or business;

Nor to redeem from pawn, for any such applicant, any tools, implements, or other articles;

Nor to purchase and give to such applicant any tools, implements, or other articles, except articles of clothing or bedding, where urgently needed, and such articles as are hereinbefore referred to in Article 1;

Nor to pay, directly or indirectly, the expenses of the conveyance of any poor person, unless conveyed under the provisions of some statute, or under an order of justices or other lawful authority, or in conformity with some order or regulation of the (Local Government) Board except in the following cases, viz.:—

1st. The case of a person conveyed to or from a district school, or an hospital or infirmary, or a lunatic asylum, or a house licensed or hospital registered for the reception of lunatics;

2nd. The case of a person conveyed to the workhouse of the union or parish in which such person is at the time chargeable;

3rd. The case of a person conveyed to or from any other workhouse, or other house or establishment for the reception of poor persons, in which for the time being, it shall be lawful for the guardians to place such person;

Not to give money to or on account of any such applicant for the purpose of effecting any of the objects in this article mentioned;

Nor to pay wholly or in part the rent of the house or lodging of any pauper, nor to apply any portion of the relief ordered to be given to any pauper in payment of any such rent, nor to retain any portion of such relief for the purpose of directly or indirectly discharging such rent, in full or in part, for any such pauper:

Provided always that nothing in this article contained shall apply to any shelter or temporary lodging procured for a poor person in any case of sudden or urgent necessity or mental imbecility.

By Article 4, no relief shall be given from the poor-rates of any of the said parishes, or of any parish comprised in any of the said unions, to any person who does not reside in some place within such parish or union respectively, save and except in the following cases:—

1st. The case of a person casually within such parish and destitute;

2nd. The case of a person requiring relief on account of any sickness, accident, or bodily or mental infirmity affecting him or her or any of his or her family.

The guardians may send sick, insane, or injured persons to establishments out of the union or parish intended for the treatment of their respective infirmities, as hospitals for the sick, asylums for the insane, and schools for the blind or deaf or dumb. It is not material whether the infirmity be of a permanent or of a temporary character; the case will be within the exception so long as the infirmity continues, whatever may be the probability of its longer or shorter duration. Such a degree of old age as to produce a physical debility would be within the exception, and so would blindness. It should be observed that, in cases of accident, it is provided by the Poor Law Amendment Act, 1848, s. 2, that where the party is not at the time of the accident in receipt of relief from the union or parish where the accident happens, the charge must be ultimately borne by the guardians of the union or parish where he has a fixed place of abode; but the guardians of the union or parish where the accident happens are not thereby relieved from their liability at common law to provide medical assistance in the first instance.

3rd. The case of a widow having a legitimate child dependent on her for support, and no illegitimate child born after the commencement of her widowhood, and who at the time of her husband's death was resident with him in some place other than the parish of her legal settlement, and not situated in the union in which such parish is comprised;

4th. The case of a child under the age of sixteen maintained in a workhouse or establishment for the education of poor children not situate within the union or parish;

5th. The case of the wife or child residing within such parish or union of some person not residing therein;

No relief shall be given to any able-bodied male person while he is employed for wages or other hire or remuneration by any person (Art. 5). Every able-bodied male person, if relieved out of the workhouse, shall

be set to work by the guardians, and be kept employed under their direction and superintendence so long as he continues to receive relief (Art. 6). With regard to the steps taken in times of exceptional distress, the following remarks of the Local Government Board (Cir. Letter, March 15, 1886) may be found useful:—"The spirit of independence which leads so many of the working classes to make great personal sacrifices rather than incur the stigma of pauperism, is one which deserves the greatest sympathy and respect, and which it is the duty and interest of the community to maintain by all the means at its disposal. Any relaxation of the general rule at present obtaining, which requires as a condition of relief to able-bodied male persons, on the ground of their being out of employment, the acceptance of an order for admission to the workhouse or the performance of an adequate task of work as a labour test, would be most disastrous, as tending directly to restore the condition of things which, before the reform of the poor laws, destroyed the independence of the labouring classes and increased the poor-rate until it became an almost insupportable burden. It is not desirable that the working classes should be familiarised with poor-law relief, and if once the honourable sentiment which now leads them to avoid it is broken down, it is probable that recourse will be had to this provision on the slightest occasion. The Local Government Board have no doubt that the powers which the guardians possess are fully sufficient to enable them to deal with ordinary pauperism, and to meet the demand for relief from the classes who usually seek it. When the workhouse is full, or when the circumstances are so exceptional that it is desirable to give out-door relief to the able-bodied poor on the ground of want of work, the guardians in the unions which are the great centres of population are authorised to provide a labour test, on the performance of which grants in money and kind may be made according to the discretion of the guardians. In other unions where the guardians have not already this power, the necessary order is issued whenever the circumstances appear to require it.

"But these provisions do not in all cases meet the emergency. The labour test is usually stone-breaking or oakum-picking. This work, which is selected as offering the least competition with other labour, presses hardly upon skilled artisans, and, in some cases, their proficiency in their special trades may be prejudiced by such employment. Spade husbandry is less open to objection, and when facilities offer for adopting work of this character as a labour test, the Board will be glad to assist the guardians by authorising the hiring of land for the purpose, when this is necessary. In any case, however, the receipt of relief from the guardians, although accompanied by a task of work, entails the disqualification which by statute attaches to pauperism. What is required in the endeavour to relieve artisans and others who have hitherto avoided poor-law assistance, and who are temporarily deprived of employment, is—

"1. Work which will not involve the stigma of pauperism;

"2. Work which all can perform, whatever may have been their previous vocations;

"3. Work which does not compete with that of other labourers at present in employment;

"And, lastly, work which is not likely to interfere with the resumption of regular employment in their own trades by those who seek it.

"The Board have no power to enforce the adoption of any particular proposals, and the object of this circular is to bring the subject generally under the notice of boards of guardians and other local authorities. In districts in which exceptional distress prevails, the Board recommend that the guardians should confer with the local authorities, and endeavour to arrange with the latter for the execution of works on which unskilled labour may be immediately employed.

"These works may be of the following kinds among others:—

"(a) Spade husbandry on sewage farms;

"(b) Laying out of open spaces, recreation grounds, new cemeteries, or disused burial-grounds;

"(c) Cleansing streets not usually undertaken by local authorities;

"(d) Laying out and paving new streets, etc.;

"(e) Paving of unpaved streets, and making of footpaths in country roads;

"(f) Providing or extending sewerage works, and works of water supply.

"It may be observed that spade labour is a class of work which has special advantages in the case of able-bodied persons out of employment. Every able-bodied man can dig, although some can do more than others; and it is a work which is in no way degrading, and need not interfere with existing employment. In all cases in which special works are undertaken to meet exceptional distress, it would appear to be necessary—1st, that the men employed should be engaged on the recommendation of the guardians as persons whom, owing to previous condition and circumstances, it is undesirable to send to the workhouse or to treat as subjects for pauper relief; and 2nd, that the wages paid should be something less than the wages ordinarily paid for similar work, in order to prevent imposture and to have the strongest temptation to those who avail themselves of this opportunity to return as soon as possible to their previous occupations. When the works are of such a character that the expenses may properly be defrayed out of borrowed moneys, the local authorities may rely that there will be every desire on the part of the Board to deal promptly with the application for their sanction to a loan."

On the 14th November 1892 another circular-letter was issued on the subject of Pauperism and Distress, there being at that time a considerable amount of distress in different parts of the country occasioned by scarcity of employment. In the letter the President of the Local Government Board remarked: "I would urge on the local authorities on whom devolves the duty of carrying out the works required for their districts, that the execution of such works should, whenever practicable, be commenced at an early date, so that employment may be given during the winter months, when work is the more needed, rather than later in the coming year.

"I would at the same time emphasise the great importance which I attach to the co-operation of boards of guardians with local authorities, in order that the pauperisation of those persons whose difficulties are occasioned only by exceptional circumstances arising from temporary scarcity of employment, and who are unwilling to become dependent on poor-law relief, may, as far as practicable, be avoided. In the case of the metropolis, some of the classes of employment suggested above are not practicable; but, apart from the execution of new works, it will probably be found that in the performance of the ordinary routine duties

of the sanitary authority occasions will arise when surplus labour may be profitably utilised."

By Article 7, provided that the regulations in Articles 5 and 6 shall not be imperative in the following cases:—

1st. The case of a person receiving relief on account of sudden and urgent necessity;

2nd. The case of a person receiving relief on account of any sickness, accident, or bodily or mental infirmity affecting such person or any of his family.

With regard to relief to members of sick benefit societies, in the opinion of the Poor Law Board the guardians were not justified, according to the strict law applicable to such cases, in giving any further relief than such an amount as would, together with the sum that the person was receiving from the benefit society, render the amount of such person's weekly income equal, and no more than equal, to that amount which the guardians hold to be necessary to relieve the destitution of a person similarly circumstanced, but who has no other means of support (*Twenty-second Annual Report, Poor Law Board*, p. 108). [This discretion has been considerably modified, see Out-door Relief (Friendly Societies) Act, 1904, *ante* p. 253.]

3rd. The case of a person receiving relief for the purpose of defraying the expenses of the burial of any of his family;

4th. The case of the wife, child, or children of a person confined in any gaol or place of safe custody;

5th. The case of the wife, child, or children resident within the parish or union of a person not residing therein.

The guardians shall, within thirty days after they shall have proceeded to act in execution of Article 6, report to the (Local Government) Board the place or places at which able-bodied male paupers shall be set to work, the sort or sorts of work in which they or any of them shall be employed, the times and mode of work, and the provision made for superintending them while working; and shall forthwith discontinue or alter the same if the (Local Government) Board shall so require (Art. 8).

No relief which shall be contrary to any regulation in this order shall be given by way of loan; but any relief which may be given in conformity with the provisions of this order to or on account of any person to whom relief may be lawfully given above the age of twenty-one, or to his wife or any part of his or her family under the age of sixteen, may, if the guardians shall think fit, be given by way of loan (Art. 9). When relief is given by way of loan and the loan is not repaid, the guardians may recover the amount before two justices (4 & 5 Will. IV. c. 76, s. 59), or in the County Court or other Court for the recovery of small debts for the district wherein the union or major part thereof is comprised (11 & 12 Vict. c. 110, s. 8 (see *post*, p. 265)).

If the guardians shall, upon consideration of the special circumstances of any particular case, deem it expedient to depart from any of the regulations hereinbefore contained (except those contained in Article 3, *ante*), and within twenty-one days after such departure shall report the same and the grounds thereof to the (Local Government) Board, the relief which may have been so given in such case by such guardians before an answer to such report shall have been returned by the said Board shall not be deemed to be contrary to the provisions of this order; and if the (Local Government) Board shall approve of such departure,

and shall notify such approval to the guardians, all relief given in such case after such notification, so far as the same shall be in accordance with the terms and conditions of such approval, shall be lawful, anything in this order to the contrary notwithstanding (Art. 10). In connection with the administration of out-door relief, it is desirable to draw attention to the circular upon that subject issued by the Poor Law Board on the 9th December 1868, in which, after reciting a lax practice existing in many unions in the administration of out-door relief, the Board state that in many cases it appears that no definite time or place is fixed by the guardians for the distribution of out-door relief in each parish, but that the relieving officers are left to make their own arrangements, not necessarily even reporting them to the guardians. In certain instances there are not more than one or two relief stations for the whole of the parishes of a union; in certain others, relief in kind is regularly given by means of tickets upon shopkeepers, a course which, though in certain cases (as where orders for relief commended by the medical officer are given), perhaps occasionally unavoidable, is, when adopted as a general rule, obviously injurious to the real interest of the poor man, as exposing him to the danger of being supplied with inferior articles at extortionate prices, or to the temptation of changing away his order for money, to the possible injury to his family. The Board find that in comparatively few instances the relieving officers are supplied with weights and scales, and that the guardians and the poor are thus deprived of proper security that the applicant really receives the full amount of relief which the guardians intended for him. The Board think it the more important to call attention to this point from the circumstance that in one county several bakers have lately been prosecuted by the police, and convicted of giving short weight, thus defrauding both the ratepayers and the poor. With a view to remedy the above-mentioned evils and deficiencies, the Board recommend that guardians, as a general rule, appoint some one or more places in each parish (not being, for obvious reasons, either a public-house or a shop) at which, at a time fixed by them and duly made public, it shall be the duty of the relieving officer to attend for the purpose of administering out-relief. Such an arrangement will at once enable the guardians to exercise due control over the relief arrangements, will render attendance for the receipt as little burdensome as possible to the poor, and will afford due facilities for applications. The appointment, however, of a station, at which the paupers who are able to do so may attend to receive their relief, should not render the relieving officer unmindful of the important duty imposed upon him by the regulations of the Board of visiting the house of any applicant for relief, and also of visiting from time to time all paupers receiving relief, and making due inquiries into the existing circumstances of each case. Nor will the relieving officer be exonerated from the duty of administering the requisite relief at the houses of paupers, who may be wholly incapable, from infirmity of body, of attending at the station, and may have no means of sending for their relief. The Board do not doubt that, in the great majority of instances, the duty of administering out-relief is discharged by relieving officers with care and fidelity, but they think that the system already in operation in many cases, of which they now recommend the universal adoption, will afford a more effectual and permanent security against neglect. To this end, they further strongly advise guardians to require their relieving officers to keep a diary, as is already done in some unions, to

be laid before the guardians at each meeting, stating shortly their times of arrival at and departure from each relief station, the name and residence of each pauper visited at his or her own home on each day, and such particulars as, without imposing unnecessary labour on relieving officers, they may deem requisite.

The Board append to the circular, for the information of guardians, a form already in use in some unions. The Board further recommend that in all cases where practicable, proper weights and scales should be kept at each out-relief station, and the use of them, so far as is necessary to check imposition, be made obligatory upon the relieving officer. The Board have reason to believe that in several parts of the country the giving relief in kind is materially, if not wholly, discontinued. They do not refer to cases of able-bodied persons receiving relief under the out-door labour test order, in which the giving of more than half of the relief in money is illegal, but to those cases also (and they are not few in number) in which, it being competent for guardians to give relief in either form, the whole is (perhaps from consideration of convenience to the relieving officers or on other grounds) given wholly in money. The Local Government Board, in a Circular-Letter of the 2nd December 1871, also adverted to some considerations which ought to be borne in mind by the guardians in the administration of out-door relief. The most important, in the opinion of the Board, is the application of an efficient workhouse test to all able-bodied applicants for relief, whether male or female, and the most strict and careful inquiries into the destitution and circumstances of all paupers to whom out-door relief is granted at their own homes. The Board desired the following recommendations to be brought under the notice of the guardians:—

1. That out-door relief should not be granted to single able-bodied men or to single able-bodied women, either with or without illegitimate children.

2. That out-door relief should not, except in special cases, be granted to any woman deserted by her husband during the first twelve months after the desertion, or to any able-bodied widow with one child only.

3. That in the case of any able-bodied widow with more than one child it may be desirable to take one or more of the children into the workhouse in preference to giving out-door relief.

4. That in unions where the prohibitory order is in force, the workhouse test should be strictly applied; and the guardians should be informed that the Board will not be prepared to sanction any cases which are not reported within the time limited by the order, and in which the reports do not contain a detailed statement of the paupers to which they refer, showing the number of their respective families, with the ages and number of children employed, amount of wages of the several members of the family at work, cause of destitution, period during which they have been without employment, amount of relief, if any, given previously to the transmission of the report, and what extent of accommodation for all classes exists in the workhouse at the time.

5. That out-door relief should be granted for a fixed period only, which should not in any case exceed three months.

6. That all orders to able-bodied men for relief in the labour yard should only be given from week to week.

7. That out-door relief should not be granted in any case, unless the relieving officer has, since the application, visited the home of the appli-

cant, and has recorded the date of such visit in the Relief Application and Report Book. Cases in which the relieving officer has not had time to visit should be relieved by him in kind only, or by an order for the workhouse.

8. That the relieving officer should be required to make at least fortnightly visits to the homes of all persons receiving relief on account of temporary sickness, and of able-bodied men receiving relief in the labour yard, and to visit the old and infirm cases at least once a quarter; and the relieving officer should be required to keep a diary with the dates and results of such visits.

9. That the provisions with respect to the compulsory maintenance of paupers by relatives legally liable to contribute to their support should be more generally acted upon.

10. That as the recommendations of medical officers for meat and stimulants are regarded as equivalent to orders for additional relief, they should in all cases be accompanied by a report from the medical officer in a prescribed form, setting forth the particulars of each case ascertained by personal inquiry.

11. That in the most populous unions it may be expedient to appoint one or more officers, to be termed "inspectors of out-relief," whose duty it would be to act as a check upon the relieving officers, and ascertain also the circumstances connected with the recipients of relief; such appointments have already been tried in Liverpool, and found to answer very successfully.

The Supplemental Labour Test Order.—In unions in which the General Prohibitory Order of December 21, 1844, is in force, the Poor Law Commissioners and the Poor Law Board, when the workhouses of those unions have been full, or when there has been an unusual pressure of able-bodied poor for relief, have issued a supplemental out-door labour test order, which, however, it must be borne in mind, is subsidiary to, and not in substitution of, the General Prohibitory Order.

The 4 & 5 Will. iv. c. 76, s. 28, enables the guardians to provide "utensils, materials for setting the poor on work" in the union, and also authorises the charging the cost and expenses as incurred to the common fund of the union.

As regards the enforcement of a task of work for poor persons relieved out of the workhouse, see 29 & 30 Vict. c. 113, s. 15.

Medical Relief to Permanent Paupers.—By Article 75 of the Consolidated Order, 1847, it is provided that the guardians shall, once at least in every year, cause to be prepared by the clerk or relieving officer a list of all such aged and infirm persons, and persons permanently sick or disabled, as may be actually receiving relief from such guardians, and residing within the district of each medical officer of the union, and shall from time to time furnish to each district medical officer a copy of the list aforesaid. By Article 76, *ibid.*, every person whose name is inserted in such list shall receive a ticket, and shall be entitled, on the exhibition of such ticket to the medical officer of his district, to obtain such advice, attendance, and medicines as his case may require, in the same manner as if he had received an order from the guardians; and such ticket shall remain in force for the time specified therein, unless such person shall cease to be in receipt of relief before the expiration of such time. These articles are intended to facilitate the obtaining of attendance and medicines by the permanent paupers—a class whose destitution is acknowledged, and which necessarily includes the most helpless portion of the

community. [By Article 227, *ibid.*, the word "medicines" includes all medical and surgical appliances, "medical attendance" includes surgical attendance, and "medical relief" includes surgical relief. A medical officer, in the absence of any special agreement to the contrary, is bound to supply "all medical and surgical appliances which may be required for the sick poor under his care at his own expense" (11 Off. Cir. 103).]

Relief by Way of Loan.—Provision is made by the 4 & 5 Will. iv. c. 76, s. 58, for declaring any relief, or the cost price thereof, given to any poor person above the age of twenty-one, or to his wife, or to any of his children under sixteen, to be on loan. The guardians may not give relief on loan in cases where they may not give out-door relief; but, subject to this, they may, if they think fit, give relief by way of loan. Relief on loan may be recovered before the justices, who have power to summon the pauper's master before them, and make an order on him to pay to the guardians any relief given on loan to the pauper out of any wages due to him (4 & 5 Will. iv. c. 76, s. 59). Relief on loan can also be recovered in the County Court (11 & 12 Vict. c. 110, s. 8). The consent of the pauper is not necessary to enable the guardians to give relief on loan, and therefore it is no answer to a claim by them that the pauper did not consent to the loan (4 & 5 Will. iv. c. 76, s. 58).

[Relief by way of loan may be given in midwifery cases in the same way as if the order were given for any other kind of relief (4 Off. Cir. 123). See also 9 Off. Cir. 24 as to the circumstances under which a loan ought to be made.

Under an Order of January 9, 1878, guardians might pay the elementary school fees of children by way of loan, but since education has become free the order is practically inoperative.

As to the relief of underfed school children, see the Relief (School Children) Order, 1905, and the Circular Letter of the Board, dated April 27, 1905. The procedure is as follows:—As the result of a special application to the guardians, either through the school authorities or some other persons, the guardians must determine "whether the relief is or is not rendered necessary by the habitual neglect of the father to provide adequate food for the child." Relief may then be given by way of loan, and the guardians must so notify the father. The relief may not last more than one month without renewal. The guardians must then take steps to recover the cost of relief from the father. The order does not apply to any case, other than that of a child who is not blind, or deaf and dumb, who resides with his father, and whose father is not in receipt of relief, other than relief given in accordance with the order (*ibid.*, Art. 7).

Relief given under the provisions of the Boarding-Out Order, 1905, to a deserted child under the age of sixteen years may (by Art. 11) be given, if the guardians think fit, by way of loan to the parent of the child. If this be done, and the parent should return, the guardians can proceed against him (Inst. Letter, May 29, 1889).]

Recovery of Relief from Paupers.—When any pauper shall have in his possession or belonging to him any money, or valuable security for money, the guardians of the union or parish to which he is chargeable may take and appropriate so much of it, or recover the same as debt before any local Court, as will reimburse them for the amount paid by them in relieving the pauper during the previous twelve months (12 & 13 Vict. c. 103, s. 16). In the event of a pauper dying possessed

of any property, the guardians may reimburse themselves the cost of his burial and his maintenance for the past twelve months (*ibid.*). [But the rule that where necessities are supplied to a person who from any disability cannot himself contract, the law implies an obligation to pay for them out of his property, extends to the case of an infant pauper supported by guardians in discharge of their statutory duty. Sec. 16 of the Act of 1869 does not operate to cut down this to one year's maintenance only, and the guardians can therefore recover as much as the Statute of Limitations allows them (*In re Clabbon*, [1904] 2 Ch. 465). This case was followed in *Birkenhead Union v. Brooks*, 1906, 4 L. G. R. 988; 70 J. P. 406, where the same extent of power of recovery was allowed in the case of an adult pauper who became entitled to money while in the union.] If there are other creditors, and the estate is insufficient, the guardians will rank as ordinary creditors (*Laver v. Botham*, [1895] 1 Q. B. 59). By the 39 & 40 Vict. c. 61, s. 23, where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same may from time to time pay to the guardians the cost of the relief of the pauper since the last instalment became due.

[The expenses of maintaining a lunatic may be recovered under the Lunacy Act, 1890, 53 & 54 Vict. c. 5, on order obtained from County Court judges or justices (*ibid.*, ss. 132, 299, 300). Where a lunatic had been maintained for many years by guardians, and became entitled to the proceeds of a fund, it was held that the guardians could not recover more than the cost of six years' maintenance from the date of their claim (*In re Watson*, [1899] 1 Ch. 72), and the balance of arrears is a valid legal debt, enforceable after the lunatic's death where an order by the Court in Lunacy has permitted part payment (*In re Taylor*, [1901] 1 Ch. 480). Such proceedings in lunacy are not sufficient to operate as *res judicata*, and are merely in the nature of Court instructions to an officer (*ibid.*). Where the guardians were maintaining a pauper lunatic the *corpus* of whose property produced a sum less than the cost of her maintenance, and which sum was paid to the guardians every year under an order of Court, which directed the application of the sum for the maintenance and benefit of the lunatic, the guardians appropriating these payments yearly, they were held on the death of the lunatic entitled to the payment of full arrears, and not only to the six years authorised by the Statute of Limitations (*Wandsworth Union v. Worthington*, [1906] 1 K. B. 520; see also *In re Williams's Trust*, 1907, 5 L. G. R. 542; 71 J. P. 209).]

Where the guardians incur any expenses in the relief of a pauper lunatic, being the member of a benefit or friendly society, whether registered or not (*Merthyr Tydvil Guardians v. Cambrian Lodge*, 1881, 45 J. P. 220), and as such entitled to receive any payment, they may recover from him as a debt, or from his executors in the case of death, the sum so expended (*ibid.*). Where the trustee, manager, or other person declines to make the payment, the guardians may apply to the justices for an order that the requisite amount should be paid at once (*ibid.*). But where the pauper's right to the annuity or payment is disputed, the justices have no power to hear and determine the matter (*R. v. Richardson*, [1894] 2 Q. B. 323). The above section does not apply, however, unless the relief was given on loan (*ibid.*). [But guardians cannot in every case recover from an industrial society money belonging to a pauper lunatic. A. and B., husband and wife,

were members of a provident and industrial society. A. became insane and a pauper lunatic. The society transferred A.'s credit to B., of which B. drew out £16, leaving a balance of £55 odd. This transaction was held a payment to the wife within sec. 29 of the Industrial and Provident Societies Act, 1893, and the guardians not entitled to obtain an order under sec. 300 of the Lunacy Act, 1890, requiring the society to pay over to them the balance of the credit, by means of proceedings in the County Court against the society, to which the wife was not a party (*Gloucester Union v. Gloucester Industrial, etc., Society*, 1906, 4 L. G. R. 1087; 70 J. P. 297.)]

Apprenticeship of Pauper Children.—Sec. 12 of the 7 & 8 Vict. c. 101 transfers the power hitherto possessed by the overseers of apprenticing pauper children to the guardians, except in the case of apprenticing to the sea service. The same section empowered the Poor Law Commissioners to prescribe the duties of the masters to whom poor children may be apprenticed, and the terms and conditions to be inserted in the indentures; and enacts that every master who wilfully refuses or neglects to comply with such terms or conditions shall, upon conviction before two justices, be liable to a penalty not exceeding £20. The guardians are required to keep a register of apprentices bound by them (42 Geo. III. c. 46, s. 1), and also of every young person taken as a servant from the workhouse (14 & 15 Vict. c. 11, s. 3). Apprentices and servants are to be visited once a year (*ibid.*, ss. 4, 5). By the 39 & 40 Vict. c. 61, s. 33, the guardians may appoint an officer for this purpose. Article 52 of the General Order, July 24, 1847, provides that no child under the age of nine years, and no child (other than a deaf and dumb child) who cannot read and write, shall be bound apprentice by the guardians. Article 53 forbids the binding of a child to a person who is not a housekeeper or assessed to the poor-rate in his own name, or to a journeyman, or to a person not carrying on trade or business on his own account, or to a person under twenty-one years of age, or to a married woman. Sec. 3 of the 3 & 4 Vict. c. 85 prohibits the binding of a child under sixteen to a chimney-sweep (see CHIMNEY). No premium, other than clothing for the apprentice, may be given where the person bound is over sixteen, unless he is maimed, deformed, or suffering from some permanent infirmity, such as may render him unfit for certain trades or sorts of work (Art. 54, Order of July 24, 1847). But before they pay the premium the guardians must obtain a doctor's certificate to this effect, [and there is no reason why this may not come from their own medical officer], which must be entered on their minutes (*ibid.*, Art. 63). No apprentice is to be bound for more than eight years (*ibid.*, Art. 56). No person over fourteen can be bound without his consent, and if under sixteen, without the consent of his father, or, if a bastard, of his mother (*ibid.*, Art. 57). Unless the Local Government Board specially permit it, a child must not be apprenticed more than thirty miles from where it is residing at the time (*ibid.*, Art. 58), [but the Board now accepts fifty miles as the limit]. Before a child under fourteen may be bound, the medical officer must certify as to his fitness, having regard to his health and strength (*ibid.*, Art. 59).

The apprenticeship of boys to the sea service by guardians is regulated by the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60. Sec. 107 provides that the indenture shall be executed in the presence of, and attested by, two justices of the peace, who shall ascertain that the boy has consented to be bound, and has attained the age of twelve years,

and is of sufficient health and strength, and that the master is a proper person for the purpose. [See also sec. 393 (3) and Part IV. of the Act; and the *Twenty-fifth Annual Report, Local Government Board*, p. 118, as to the fishing apprenticeship system; and APPRENTICE.]

Sec. 28 of the 39 & 40 Vict. c. 61 enables the guardians to pay the expenses of sending any boy who is, or whose parents are, in receipt of relief, and who is desirous of joining the Royal Navy, to any port or place in the United Kingdom for examination.

[By the General Order (Apprenticeship of Pauper Children), February 15, 1898, it is declared that where it may seem necessary and expedient to the Board they may assent to a departure from any existing regulations dealing with the apprenticeship of pauper children.]

Boarding Out of Pauper Children.—[Guardians have power to board out children in homes, both within and beyond the limits of their union. Their powers in respect of children boarded out beyond the limits of the union are regulated by Order of the Local Government Board, dated December 4, 1905. The boarding out is carried on in accordance with arrangements made with a boarding-out committee, having authority and constituted according to the regulations of the order. This committee consists of persons approved by the Local Government Board, who are required to sign an engagement to observe the Board's regulations on the subject, and who then obtain the Board's written authority to enter into arrangements with boards of guardians for the purpose of finding and superintending homes for children. A committee is to consist of not less than three members, one of whom must be a woman. No person deriving pecuniary or other profit from boarding out may be a member of the committee. The committee appoints one of their number as secretary, and he is the recognised correspondent with the Board, and is the person required to make the half-yearly return of children to the Board. Article 6 of the Order lays it down that only deserted or orphan children, or those of whom the guardians have constituted themselves statutory parents, may be boarded out, and prescribes the number of children that may be boarded with one family. The character and religion of the foster-parents must be inquired into, and no child may be sent to a place which is licensed for the sale of intoxicating liquor. The foster-parent is required to enter into a written undertaking with the guardians as to his treatment of the child, and is prohibited from insuring the child's life. The schoolmaster is required to report on the child's progress to the guardians once a quarter. Boarded-out children are to be regularly visited by a member of the committee not less than once in every six weeks, who is to take notice of all complaints. Regular reports are to be sent to the guardians once a quarter, and if no report arrives for a space exceeding four consecutive months the guardians are to send one of their officers to inspect any child so neglected. In the absence of, or suppression of, a boarding-out committee the guardians may themselves arrange for the proper inspection of the children. Reasonable expenses incurred in the conveyance of children from and to the union may be paid by the guardians, and they may, if they think fit, advance to the committee all such sums as are likely to be expended by them during an ensuing quarter (Art. 12).

The boarding out of children within the limits of a union is governed by the Boarding of Children in Unions Order, May 28, 1889, and is in the nature of out-door relief to orphan or deserted children by payments to foster-parents. In addition, the medical officer is required to visit and

report on all children once a quarter, as also is the relieving officer. As in the case of out-boarding, so for in-boarded children local committees may be formed, and in such an event the regulations are very similar to those detailed above. For the progress of boarding out, see the Annual Reports of the Local Government Board.]

Burial of Paupers.—The guardians may bury the body of any poor person which may be within their union (7 & 8 Vict. c. 101, s. 31). But they are not bound to do so. The legal obligation to bury a dead body is on the occupier of the premises in which the death occurred (*R. v. Stewart*, 1840, 12 Ad. & E. 773; 10 L. J. M. C. 40; *R. v. Price*, 1883, 12 Q. B. D. 247). If the guardians bury the body, they may recover the cost out of any property belonging to the pauper (12 & 13 Vict. c. 103, s. 16; *Laver v. Botham & Sons*, [1895] 1 Q. B. 59). The guardians bury a pauper dying outside the union and pay the costs, and recover the same from the parties (if any) from whom they could recover the cost of relief to the pauper (*ibid.*, s. 17). If the parish burial-ground is closed or overcrowded, the guardians may bury in the neighbouring parish, and may enter into agreements for the burial of the bodies of poor persons (18 & 19 Vict. c. 79, ss. 1, 2).

[*Cottage Homes.*—The growing feeling that children should be removed, if possible, from workhouses, led to the appointment of a Select Committee to inquire into the Cottage Homes Bill in 1899. No Act has been passed yet. The Local Government Board has circularised guardians with a view to the separate treatment of children (*Thirteenth Annual Report, Local Government Board*, p. 18). See also the remarks on children's homes in the *Thirty-sixth Report* (1906-07), p. 345. It has also been suggested that the aged deserving poor should be placed in cottage homes.]

Deaf and Dumb Persons.—Guardians may provide for the education of pauper children in certified schools for the instruction of blind, deaf, dumb, lame, deformed, or idiotic persons (25 & 26 Vict. c. 43). Guardians have no power to send blind or deaf children to school, other than idiots or imbeciles, or those children resident in a workhouse, or in an institution to which they have been sent by a board of guardians from a workhouse, or boarded out by guardians. The Elementary Education (Blind and Deaf Children) Act, 1893, 56 & 57 Vict. c. 42, makes provision for the education of blind and deaf children not included in the above exceptions. Guardians may also provide for the reception and maintenance and instruction of adult blind, deaf, or dumb paupers in any institution established for the purpose (30 & 31 Vict. c. 106, s. 21). The 31 & 32 Vict. c. 122, s. 13, enables guardians to pay the cost of idiots sent to asylums.

Emigration of Poor Persons.—The guardians of unions and separate parishes can expend money in the emigration of any poor person residing therein, whether actually in receipt of relief or not, with the exception of the case of orphan or deserted children under sixteen years of age, who must be chargeable. The statutes authorising this are the 4 & 5 Will. iv. c. 76, s. 62; 7 & 8 Vict. c. 101, s. 29; 12 & 13 Vict. c. 103, s. 20; and 13 & 14 Vict. c. 101, s. 4. [Before children can be emigrated, authorising orders of the Local Government Board are required. Usually the bulk of these emigrants are orphaned or deserted, but others also are sent. The great majority goes to Canada. During the last ten years' period (1897-1906) 2498 children were emigrated. See the *Thirty-sixth Report* (*ibid.*), pp. cxxviii., 402.]

Payment of School Fees.—By sec. 10 of the Elementary Education

Act, 1876, the guardians are required to pay the school fees, not exceeding threepence per child per week, of children whose parents are not paupers, and apply to the guardians to do so, where they are satisfied of the parents' inability to pay them. Such payments do not amount to relief so as to disqualify the parent in the manner poor relief otherwise does. Sec. 40 of the same statute enables the guardians to make it a condition of relief out of the workhouse that the recipient send his child to a public elementary school, unless such child shall have passed the Third Standard of the Code of 1876. When a child is sent to a certified day industrial school, and the parent ordered to maintain it, the parent may, if unable to pay the sum required by the order to be paid, apply to the guardians, who, if satisfied, of his inability, are bound to give the parent sufficient relief to pay, or so much of it as they consider him unable to pay (39 & 40 Vict. 79, s. 16 (3)). [The Elementary Education Act, 1902, 2 Edw. VII. c. 42, makes the above provisions practically unnecessary, as by the Act it is the duty of the education authority to provide a sufficient amount of public-school accommodation without payment of fees in every part of their area.]

Pauper Lunatics.—Where a pauper lunatic is sent to an asylum, or where an inmate of an asylum becomes a pauper, he is to be deemed chargeable to the union from which he was sent, until it is established that he is settled in some other union (53 & 54 Vict. c. 5, s. 286; 54 & 55 Vict. c. 65, s. 19). Orders for the maintenance of pauper lunatics may be made on the guardians by the justice who sent the lunatic to the asylum. The justices may also adjudge the settlement of the pauper, and order the union liable to pay the expenses of his maintenance, etc. (53 & 54 Vict. c. 5, ss. 287, 289). The guardians obtaining the order must send notice of it to the guardians of the union to which the lunatic is adjudged to be settled (*ibid.*, s. 302). An appeal lies to Quarter Sessions against such an order (*ibid.*, s. 303). [Under sec. 283, *ibid.*, the visiting committee of an asylum cannot fix a sum greater than fourteen shillings per week to be charged for the expenses of the lodging and maintenance of pauper lunatics in the asylum, even in the case of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs (*Pitch v. Bermondsey Guardians*, [1905] 1 K. B. 524).] The guardians may recover the costs of a lunatic's maintenance out of his estate (*ibid.*, ss. 299, 300, and *ante*, p. 265). [By sec. 14 of the Lunacy Act, 1890, paupers who are lunatics and proper to be sent to an asylum are brought before a "justice having jurisdiction in the place where the pauper resides" for an order. A pauper became chargeable as a lunatic to a union while residing in a workhouse infirmary outside the boundaries of the union, and it was held that a justice having jurisdiction in the union to which the workhouse infirmary belonged had power to deal with the case (*R. v. Bell*, [1900] 2 Q. B. 391).] Provision is made by sec. 24 (2) of the Local Government Act, 1888, 51 & 52 Vict. c. 41, for a contribution by the County Council in respect of the maintenance of pauper lunatics. See *tit. ASYLUMS*.

Funds for the Relief of the Poor.—By the Union Chargeability Act, 1865, 28 & 29 Vict. c. 79, it is directed that all the cost of relief to the poor, and the expenses of the burial of the poor by guardians, as well as expenses in connection with registration and vaccination, shall be charged upon the common fund of the union. By Article 1 of the General Order, February 26, 1866, the clerk shall, as soon as convenient before the 25th

day of March next, and thenceforth four weeks at least before the 29th day of September and the 25th day of March respectively in each year estimate the probable amount of the expenditure in the relief of the poor, and other charges by the guardians on behalf of the union, as well as any separate expenditure chargeable against any parish therein during the then next ensuing half-year, and estimate the probable balance due to or from each parish at the end of the current half-year, and shall apportion the sums to be contributed by the several parishes comprised in the union, according to the law for the time being in force therein, and shall prepare the orders on the overseers or other proper authorities of the several parishes for the payment of such respective contributions, and of any such separate expenditure as aforesaid, and the orders so prepared shall be laid before the guardians for their consideration a reasonable time before the expiration of the current half-year. By Article 2 the guardians shall make orders on the overseers or other proper authorities of every parish in the union, at the commencement of each half-year ending on the days above mentioned, and from time to time as occasion may arise, for the payment to the guardians of all such sums as may be required by them, as a contribution of the parish to the common fund of the union, and for any other expenses separately chargeable by the guardians in the parish; and in such orders the contributions shall be directed to be paid by one sum, or by instalments, on days to be specified in such orders, as to the guardians may seem fit. A form is prescribed for the order, which must be signed by the presiding chairman and two other guardians, and countersigned by the clerk.

The several parishes of the union are required to contribute to the common fund in proportion to the annual rateable value of the lands, tenements, and hereditaments in such parishes respectively assessable to the poor-rate (24 & 25 Vict. c. 55, s. 9). The basis of the contributions is fixed by the Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103, s. 20. By that section it is directed that when the assessment committee for any union shall have approved lists for all the parishes in the union, the contributions for the common fund shall be based upon the valuation lists lastly approved of for such parishes (see tit. ASSESSMENT COMMITTEE).

In case the contributions required from any parish should be in arrear, the guardians may proceed under sec. 1 of the 2 & 3 Vict. c. 84. This section empowers the justices, on the application of the guardians, to issue a warrant to cause the amount of contribution in arrear to be levied and recovered from the overseers, in the same way that a poor-rate is recovered from a ratepayer in default; or the overseers may be fined for their neglect under sec. 98 of the 4 & 5 Will. IV. c. 76.

The treasurer of the union is required to report in writing to the Local Government Board whenever there are no funds in his hands belonging to the union (General Order, July 24, 1847, Art. 203 (4)).

In connection with the making of contribution orders, it may be remarked that the guardians have no power to make a retrospective order, nor have overseers power to make a retrospective rate, and that therefore the guardians cannot raise money for the payment of old debts, the legal principle being that taxation can only be exercised to meet prospective expenses (*Waddington v. City of London Union*, 1859, 28 L. J. M. C. 113; 22 J. P. 755; *A.-G. v. Wilkinson*, 1859, 28 L. J. Ch. 392; 22 J. P. 211; see also *R. v. Leigh Rural District*

Council, [1898] 1 Q. B. 836). [The Poor Law (Payment of Debts) Act, 1859, 22 & 23 Vict. c. 49, allows certain debts legally incurred to be paid within certain limits of time, and the Local Government Board has power to extend the time still further. See on this point the cases cited in Macmorran and Lushington's *Poor Law General Orders*, 1905 ed., vol. i. pp. 81, 387.]

Metropolitan Poor.—In the metropolis further provision is made for the management of the poor by the Metropolitan Poor Act, 1867. This statute provides for the establishment of asylums for the reception of the sick, insane, or infirm poor chargeable to unions in the metropolis, of dispensaries for the poor, and for district schools for pauper children. The expenses of the Act are defrayed out of a common fund raised by contributions from the several unions, parishes, and places in the metropolis. For the purposes of the Act the metropolis is divided into districts, and for each district a body of managers is elected by the guardians of the several unions and parishes forming the district. Sec. 11 of the Metropolitan Poor Amendment Act, 1869, enables the managers of any asylum district to provide training ships for boys for the sea service, and the Poor Law Act, 1889, provides for the reception of diphtheria patients into the asylums provided by the managers for fever and small-pox patients. The statute has been amended by the 31 & 32 Vict. c. 122, ss. 9, 35; 32 & 33 Vict. c. 63, ss. 6, 9, 20; 33 & 34 Vict. c. 18; 34 & 35 Vict. c. 15; 38 & 39 Vict. c. 66; 40 Vict. c. 61, ss. 40, 41; 42 & 43 Vict. c. 6, s. 11; 53 & 54 Vict. c. 5, s. 342; 56 & 57 Vict. c. 73, s. 89; 60 & 61 Vict. c. 29, s. 3; 61 & 62 Vict. c. 45; and see also the Metropolitan General Orders of the Local Government Board.

[*Discharged Prisoners.*—By the Released Persons (Poor Law Relief) Act, 1907, 7 Edw. VII. c. 14, which extends only to England and Wales, when it appears to a justice that a person who is about to be released from prison will, by reason of infirmity of mind or body, require immediate poor law relief he may make an order for removal (to operate on liberation) to the workhouse of the union in which the pauper appears to him to be settled, or, if the settlement cannot be ascertained, to the workhouse indicated by the Act. The justice takes action on receiving written notice from the prison governor, and he must be qualified to act for the district in which the prison is, or be a member of its visiting committee. If settlement cannot be ascertained the prisoner will be chargeable to the union in which his ordinary residence was at the time his offence was committed; or, if this also be unascertainable, to the union in which the offence was alleged to have been committed, or if the offence were committed out of the United Kingdom to the union in which the Court of Summary Jurisdiction sat by which the person was convicted or committed for trial, or ordered to be detained (*ibid.*, s. 1 (2)).

If, however, the person is too ill to be removed far, the justice may suspend the operation of the order, and the prisoner on his release must be conveyed to the workhouse of the union in which the prison is situate, but the expenses of maintenance there are to be repaid by the guardians of the union named in the justice's order (*ibid.*, s. 1 (4)).

The Act is made applicable by sec. 2 to persons detained in industrial and reformatory schools, and by sec. 3 to persons detained in inebriate reformatories, subject to certain necessary modifications to suit the circumstances of such cases.

The fact of an order having been obtained under the provisions of

7 Edw. VII. c. 14, does not prevent the guardians of the union named in such order from applying for an order of removal under the ordinary poor law, and if such an order be obtained the provisions of the Act no longer apply (*ibid.*, s. 1 (5)).

Where a person has not a place of settlement or residence in England and Wales, for the purposes of the Act his place of settlement or residence is deemed to be unascertainable (s. 4).

Where a prisoner is about to be released the prison authorities permit the guardians of any union to which his family has become chargeable to serve him with notice, a few days before release, that his family has become chargeable, and that he will be responsible for them. This prevents prisoners setting up a plea of ignorance, which has been accepted by some justices on a charge of neglect to maintain (Off. Cir., March 3, 1905).]

SETTLEMENT AND REMOVAL OF THE POOR.

Settlement and Removal Generally.—"By the term 'settlement' is to be understood a permanent indestructible right to take the benefit of the poor laws in a particular parish or place which maintains its own poor" (Gambier on *Par. Sett.*, 1). A settlement is the right acquired in any one of the modes pointed out by the poor laws to become a recipient of the benefit of those laws, in that parish or place which provides for its own poor where the right has been last acquired. It is not forfeitable, and may be communicated from person to person (*R. v. St. Mary, Cardigan*, 1794, 6 T. R. 116). *Primâ facie* the place of a person's birth is his place of settlement (*R. v. Heaton Norris*, 1796, 6 T. R. 653; 3 R. R. 302). But a birth settlement is only *primâ facie*, and is liable to be defeated by proof of the settlement of the parents, or of a subsequently acquired settlement by the pauper. Thus, as a general rule, a child under the age of sixteen takes the settlement of its father or widowed mother, as the case may be, up to that age, and retains it until it acquires another (39 & 40 Vict. c. 61, s. 35). Similarly, an illegitimate child takes and retains the settlement of its mother (*ibid.*). The exception is where the parent's settlement was itself derivative, in which case children of either class, as soon as they attain the age of sixteen, are thrown upon their own birth settlement until they acquire another (see *per* Lord Watson, *Reigate Guardians v. Croydon Guardians*, 1889, 14 App. Cas., at p. 484). [A. was an illegitimate child of B., a pauper mother. Neither A. nor B. had acquired a settlement. It was proved that the father of B. had a settlement, and that she derived that settlement from him. A. took the settlement of the parish in which she was born, since it could not be shown what settlement she derived from her mother B. without inquiring into the derivative settlement of the mother (*Plymouth Union v. Axminster Union*, [1898] A. C. 586).] A wife takes her husband's settlement on marriage if he has one (*St. Giles, Reading v. Eversley, Blackwater*, 1724, 1 Stra. 580; 2 Raym. (Ld.) 1332; *R. v. Hinxworth*, 1778, Cald. 42; 1 Doug. 46n.), and she cannot gain a settlement of her own whilst married (*R. v. Aythorpe, Rooding*, 1756, Burr. S. C. 412). A settlement may also be gained by residence, by being bound apprentice, by the renting of a tenement rated at not less than £10 a year, by payment of rates, or by owning an estate. It has been stated that having a settlement in a particular place gives a person a right to take the benefit of

the poor laws in that place. But if a person becomes chargeable, the guardians may obtain an order for his removal to his place of settlement (14 Car. II. c. 12), unless the person has gained a "status of irremovability," in which case he cannot be removed (9 & 10 Vict. c. 66, s. 1), but must be relieved at the cost of the union in which the parish is from which he is irremovable. In practice therefore it is necessary, before inquiring into a pauper's settlement, to ascertain whether he has gained a status of irremovability. No person can be removed until he becomes actually chargeable to the poor-rates (35 Geo. III. c. 101, s. 1). Provided that every person who shall have been convicted of larceny or any other felony, or who shall appear to two justices of the division in which he resides, upon the oath of two or more credible witnesses, to be a person of evil fame or a reputed thief, such person not being able to give a satisfactory account of himself, or who has been convicted as an idle and disorderly person, or as a rogue and a vagabond, shall be deemed to be a person actually chargeable and liable to be removed to the parish of his last legal settlement (*ibid.*, s. 5; 5 Geo. IV. c. 83, s. 20).

Persons Irremovable.—The effect of the 9 & 10 Vict. c. 66, s. 1, as amended by the 24 & 25 Vict. c. 55, s. 1, and the 28 & 29 Vict. c. 79, s. 8, is that no person can be removed, nor may any warrant be granted for his removal, from any union in which he has resided for one year next before the application of the warrant. And in computing the above period of residence the time during which a person is a prisoner in a prison; serving His Majesty as a soldier, marine, or sailor; residing as an in-pensioner in Greenwich or Chelsea hospitals; confined in a lunatic asylum or house duly licensed, or hospital registered for the reception of lunatics; a patient in a hospital; or during which any such person shall receive relief from any union or parish, or shall be wholly or partly maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bond-fide* charitable gift, is to be excluded. But a removal to a lunatic asylum is not to be deemed a removal for the purposes of this section. Time spent by a child in an industrial school is also to be excluded in computing residence (29 & 30 Vict. c. 118, s. 31), and also the time during which a person is confined in a retreat for habitual drunkards (42 & 43 Vict. c. 19, s. 32). Residence as a widow will coalesce with residence as wife to complete the one year's residence to give a status of irremovability (*R. v. Glossop*, 1848, 12 Q. B. 117; 17 L. J. M. C. 171; 12 J. P. 597), [but see the remarks of Lord Watson in *Reigate Guardians v. Croydon Guardians*, 1889, 14 App. Cas., at p. 487. This case does not, however, clash with the principle in every direction, as the following instance shows. A. and B., man and wife, resided in a parish for part of a year. A. was a foreigner, and had no settlement. He went abroad intending to return, and B. remained for the rest of the year in the parish, and then became chargeable. It was held that she could not be removed (*Guardians of Tewkesbury v. Guardians of Birmingham*, [1904] 2 K. B. 395)]. A pauper is irremovable although his term of one year's residence is computed by the time in which he lived in two or more parishes of the union (*R. v. Bolton-le-Sands*, 1865, 35 L. J. M. C. 54; 12 Jur. N. S. 371; 13 L. T. N. S. 523); and this will be so although one of the parishes has been added to or separated from the union (31 & 32 Vict. c. 122, s. 34). It has been held that if a parish is divided under sec. 1 (3) of the Local Government Act, 1894, a status of irremovability gained in the undivided parish would be lost (*Dorking Union v. St.*

Saviour's Union, 1897, 61 J. P. 708; 13 T. L. R. 558; 1898, W. N. 12 (5)), [but the reasoning of this case has been doubted in *West Ham Union v. London County Council*, [1904] A. C. 40, and it may be regarded that an order made by a county council or by a joint committee, under the Act of 1894 (s. 36), and duly confirmed with regard to a parish which at the passing of the Act of 1894 was situate in more than one urban district, may in providing for the union of one of such parts of the parish with another parish, and the constitution of the remaining part into a separate parish, provide also that such alteration of the parish shall not have the effect of destroying settlements acquired therein prior to the coming into operation of the order (*R. v. Middlesex Justices, Ex parte Walsall Union*, [1906] 2 K. B. 365); see also *Colne Union v. St. Mary, Islington Guardians*, 1900, 69 L. J. Q. B. 400; 64 J. P. 246, where a similar order was held legal]. As to the meaning of the word "resided," it was said by Coleridge, J., in *Blackwell v. England*, 1857, 27 L. J. Q. B. 124, that under the Poor Law Acts "residence" means where the pauper sleeps. It may also be said to mean home or domicile (*Lambe v. Smythe*, 1846, 15 L. J. Ex. 287). But residence in a parish, to gain a status of irremovability, need not be in a house. Thus where a destitute woman who had resided for sixteen years in the parish of S. gave up her lodgings and wandered about the parish by day and slept on door-steps at night, and then for three weeks slept in a refuge in another parish, but returning each day until she was admitted into the workhouse, it was held that she had not ceased to reside in S., and was therefore irremovable (*R. v. Shoreditch*, 1865, L. R. 1 Q. B. 21; 6 B. & S. 784; 35 L. J. M. C. 48; 29 J. P. 728). The residence must be continuous and without break (*R. v. Llanelly*, 1851, 17 Q. B. 40; 20 L. J. M. C. 179; 15 J. P. 534). A temporary absence out of a parish for the purpose of fulfilling a contract does not amount to a break of residence (*R. v. Brixthelmstone*, 1854, 4 El. & Bl. 236; 24 L. J. M. C. 41).

Whether or not there has been a break of residence would seem to depend on the particular circumstances of each case, the point being not only whether a person has left the one parish, but whether he intended to reside permanently in another (*R. v. St. Ives*, 1872, L. R. 7 Q. B. 467; 41 L. J. M. C. 41; 36 J. P. 645). [Every circumstance must be taken into consideration (*Tendring Union v. Ipswich Union*, 1903, 1 L. G. R. 574).] Thus an absence for a mere temporary purpose, with an intention to return, will be no break in the residence. But an intention to return at a remote period, after a permanent absence, is not sufficient to prevent the absence from being a break (*per Blackburn, J.*, in *Wellington v. Whitchurch*, 1863, 4 B. & S. 100; 32 L. J. M. C. 189; 27 J. P. 644). Where a pauper having acquired a status of removability from the parish of B., by residence went into the parish of C., and there met with an accident, and was there taken into the workhouse, and after being cured was detained in the workhouse by subsequent illness, the Court of Queen's Bench held an order removing him to W., his place of settlement, correct (*R. v. Cuckfield*, 1855, 25 L. J. M. C. 4; 20 J. P. 196). In *R. v. Stourbridge*, 1865, 34 L. J. M. C. 179; 11 Jur. N. S. 799, it was held that a pauper, having occupied lodgings in a parish, and who left the parish intending to return as soon as trade became better, but did not retain his lodgings, although he left some old clothes with his landlord to keep for him, and could have returned to his lodgings at any time, had not been constructively resident in the parish, and that his absence constituted a break of residence. The break of residence must

be due to the voluntary act of the party in order to destroy the status of irremovability. Thus where a pauper who was irremovable became insane and was removed into another union by her mother, it was held that she had not lost the status of irremovability thereby (*R. v. Whitby*, 1870, L. R. 5 Q. B. 325; 39 L. J. M. C. 97; 34 J. P. 725; *R. v. Bruce*, [1892] 2 Q. B. 136; 56 J. P. 567). In the following case it has been held that there had been a break of residence. A pauper, a journeyman tailor, having resided in the parish of B. for forty-five years, was admitted into the workhouse. R., a tailor living in a neighbouring parish, being in want of a hand, the master tailor of the workhouse told the pauper he might go to R., and if R. and he did not agree, he might come back. The pauper went to R. and worked for him for ten weeks, when he and R. not agreeing, the pauper came back to the workhouse. If they had agreed, the pauper might have continued working for R., and R. told the pauper he might stay as long as he thought proper (*R. v. Birmingham*, 1874, L. R. 9 Q. B. 340; 43 L. J. M. C. 102; 38 J. P. 407). See also *Totness Union v. Cardiff Union*, 1886, 51 J. P. 133. Imprisonment out of the parish does not constitute a break of residence, not even if the sentence be of penal servitude (*R. v. Hartfield*, 1852, 17 Q. B. 746; 21 L. J. M. C. 65; 16 J. P. 181; *R. v. Potterhanworth*, 1858, 28 L. J. M. C. 56; 23 J. P. 564). The time during which the pauper was in jail is to be deducted merely (9 & 10 Vict. c. 66, s. 1). [So, too, in the case of a pauper who while continuing in receipt of relief from one union goes to reside in another union (*Poplar Union v. West Ham Union*, 1906, 4 L. G. R. 512; 70 J. P. 255). In a similar way a man who resides in a hospital, home, or institution cannot for the purpose of acquiring a settlement be regarded as residing in the union in which the union is situate (*Ormskirk Union v. Chorlton Union*, [1902] 1 K. B. 19).]

By the 11 & 12 Vict. c. 111, whenever any person has a wife or children having no other settlement than his or her own, such wife and children are removable from any parish or place from which he or she would be removable notwithstanding any provisions of the 9 & 10 Vict. c. 66, and are not removable from any parish or place from which he or she would not be removable by reason of any provision in the last-mentioned statute. This section operates to render a wife or children irremovable only where the husband or father has acquired a status of irremovability under the provisions of 9 & 10 Vict. c. 66 (*R. v. East Stonehouse*, 1854, 23 L. J. M. C. 137). But where the husband cannot be removed on account of his absence from the parish or other cause, this fact does not render the wife and children irremovable, as, for instance, in the case of a deserted wife and her children (*R. v. St. Ebbe*, 1848, 18 L. J. M. C. 14; 13 J. P. 216). When a child has a different settlement from its mother, as in the case where a widow with a legitimate child marries a second husband, the child cannot whilst under the age of nurture (seven) be separated from its mother even with her consent (*R. v. Birmingham*, 1843, 5 Q. B. 210; 13 L. J. M. C. 1; 7 J. P. 705). A wife cannot be removed from her husband's parish of irremovability, and this applies even if the husband is in prison in that parish, provided there is a possibility of consortium between them (*R. v. Stogmuber*, 1839, 9 Ad. & E. 622; 8 L. J. M. C. 20). A married woman, deserted by her husband, can gain a status of irremovability by residence for one year after his desertion in such manner as would, if she were a widow, render her exempt from removal, and she is not liable to be removed from the parish wherein she shall be resident, unless her

husband return to cohabit with her (24 & 25 Vict. c. 55, s. 3; 29 & 30 Vict. c. 113, s. 17). The point will sometimes arise as to what amounts to desertion for the purposes of this section. In the case of *R. v. Maidstone*, 1879, 5 Q. B. D. 31; 49 L. J. M. C. 25; 44 J. P. 440, where the husband did not absent himself from the conjugal home, but turned his wife out because she had committed adultery, and refused to receive her back, the Court held that there had been such a desertion of him by her as to bring the case within 24 & 25 Vict. c. 55, s. 3. [This case was followed in *Guardians of Southwark v. Guardians of City of London*, [1906] 2 K. B. 112, where a married woman living apart from her husband at his request, on account of her drinking habits, committed adultery. He ceased his allowance to her, and she became chargeable. He was held to have deserted her within the meaning of sec. 3 of the Act of 1861.] But where the wife departed from the conjugal home of her own free will, and remained absent for some years living in adultery with another man, it was held to be otherwise (*R. v. Cookham*, 1882, 9 Q. B. D. 522; 47 J. P. 116). [See also *Rutherglen Parish Council v. Glasgow Parish Council*, [1902] A. C. 360.] As to the irremovability of widows, the 9 & 10 Vict. c. 66, s. 2, enacts that no woman, residing in any parish with her husband at the time of his death, shall be removed, nor shall any warrant be granted for her removal, from such parish for twelve calendar months next after his death, if she so long continue a widow. This exemption from removal, enjoyed by a widow for twelve months after her husband's death, is lost by a break of residence within the year of her widowhood (*R. v. St. Marylebone*, 1851, 16 Q. B. 352; 20 L. J. M. C. 173).

No child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child from such parish in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish (9 & 10 Vict. c. 66, s. 3). And by sec. 2 of the 24 & 25 Vict. c. 55, where a child under the age of sixteen years residing with its surviving parent shall be left an orphan, and such parent shall at the time of death have acquired an exemption from removal by reason of continued residence, such orphan shall, if not otherwise irremovable, be exempt from removal in like manner and to the same extent as if it had then acquired for itself an exemption from removal by residence.

No warrant may be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant are satisfied that the sickness or accident will produce permanent disability (9 & 10 Vict. c. 66, s. 4).

Pregnancy is not "sickness" within the meaning of this section (*R. v. Huddersfield*, 1857, 26 L. J. M. C. 169; 22 J. P. 160); but incurable blindness is (*R. v. Bucknell*, 1854, 23 L. J. M. C. 129; 18 J. P. 503). The 9 & 10 Vict. c. 66, s. 6, provides a penalty for illegally procuring the removal of any poor person who becomes chargeable to any parish to which he was not before chargeable.

Settlement.—If a pauper is not irremovable, and it is sought to remove him, his last place of settlement will have to be ascertained. A pauper's settlement may have been gained by himself by residence, by having been bound apprentice, by owning an estate, or by renting a tenement, or it may be derived from a parent, or, in the case of a woman,

from her husband. And, lastly, there is the settlement by birth, upon which it may be possible to throw the pauper should he be found not to have any other settlement.

Residence.—Since the 15th of August 1876 a settlement may be gained by any person who has resided for three years in any parish in such a manner and under such circumstances in each of such years as would have rendered him irremovable (39 & 40 Vict. c. 61, s. 34; and see *ante*, *Persons Irremovable*). The word “parish” in this section does not include a union (*Plomesgate Union v. West Ham Union*, 1881, 6 Q. B. D. 576; 45 J. P. 633; *Guardians of Sunderland v. Sussex*, 1881, 8 Q. B. D. 99; 46 J. P. 375; 51 L. J. M. C. 4). But where B., a city comprising eighteen parishes, by a local Act was incorporated so that one uniform rate for the poor might be made in each parish, and it was adjudged that a pauper had by three years’ residence in B. acquired a settlement under this section, it was held by the Queen’s Bench Division that the order was rightly made (*Bristol v. Barton Regis*, 1892, 56 J. P. 311). The residence of the wife cannot be treated as the residence of the husband. [The absence of a man on military service from the parish where he lives breaks his residence in the parish for the purposes of the Act of 1876, s. 34, even if his house be kept up and his wife and children live there and he intends to return when his service is completed (*Newark Union v. Maidstone Union*, 1905, 3 L. G. R. 1005; 69 J. P. 413).] Thus, where a seaman left his wife and went to sea with the intention of returning to her, and during his absence she removed from the parish in which they were residing and took lodgings in another parish where he joined her, it was held, in the absence of evidence that the lodgings were taken by the husband’s directions, that he could not be treated as having been constructively resident there, and that the period which elapsed between his return could not be computed as part of a three years’ residence by him (*West Ham Union v. Cardiff Union*, [1895] 1 Q. B. 766; 59 J. P. 343). The expression “term of three years” means an unbroken period of three consecutive years (*Dorchester v. Weymouth*, 1885, 16 Q. B. D. 31; 55 L. J. M. C. 44; 50 J. P. 310). Time spent as a patient in a hospital must be excluded from the calculation (*St. Olave’s Union v. Canterbury Union*, [1897] 1 Q. B. 682; 61 J. P. 371). Long absence, as, for example, a year out of the county engaged in work, has been held to amount to a break of residence (*Totness Union v. Cardiff Union*, 1886, 51 J. P. 133). [A person (*e.g.* a railway guard) who has his house in one town and lodgings in another, sleeping alternate nights in each, is “settled” in the place where he has his house (*Great Yarmouth Union v. St. Matthew (Bethnal Green) Guardians*, 1907, 5 L. G. R. 1105; 71 J. P. 422).]

The effect of sec. 34 of the 39 & 40 Vict. c. 61 is not retrospective, and therefore it is necessary, in order to give a pauper a settlement, that some part of the three years’ residence should have been after August 15, 1876 (*R. v. Guardians of Ipswich Union*, 1877, 2 Q. B. D. 269; 46 L. J. M. C. 207). In *R. v. Brompton Union*, 1878, 3 Q. B. D. 479; 43 J. P. 156; 47 L. J. M. C. 114, it was held that a person who had resided in a parish for the term of three years, and who continued to reside there until the passing of the Act, but who, during the period subsequent to the three years, had been in receipt of relief from the parish, acquired a settlement therein under the section. A pauper who had resided for three years in a reformatory in the parish of F., which was supported by offertories from without the parish and by annual

subscriptions from persons resident all over the country, she paying nothing for her maintenance and clothing, was held to be settled in F., as the money collected for her maintenance was a *bonâ-fide* charitable gift, and she had not been maintained by a rate or subscription raised in a parish in which she did not reside, within the meaning of the proviso to sec. 1 of the 9 & 10 Vict. c. 66 (*Guardians of Fulham v. Guardians of Thanet*, 1881, 7 Q. B. D. 539; 45 J. P. 552; [but see also *Ormskirk Guardians v. Chorlton Guardians*, [1903] 1 K. B. 19]). A deserted wife can gain a settlement by three years' residence (24 & 25 Vict. c. 55, s. 3; *R. v. Maidstone*, 1879, 5 Q. B. D. 31; 44 J. P. 440; 49 L. J. M. C. 25).

Residence under sixteen, if consistent with irremovability, may be added to residence over sixteen, so as to constitute residence for "the term of three years" (*Reigate Union v. Croydon Union*, 1889, 14 App. Cas. 465).

In the *Guardians of West Ham v. St. Matthew, Bethnal Green*, [1894] App. Cas. 230; 58 J. P. 493, where a pauper, nearly fourteen years old, went into domestic service in the parish of L. in the West Ham Union, remained there nearly four years, and left before she became eighteen and resided outside the union with her mother, her father having died when she was two years old, and her widowed mother never having resided in or become irremovable from or gained a settlement in that union, it was held that upon the true construction of the 9 & 10 Vict. c. 66, s. 1, and the 11 & 12 Vict. c. 111, s. 1, and the 39 & 40 Vict. c. 61, s. 34, the pauper had not resided for the term of three years in the parish of L. in such manner and in such circumstances in each of such years as would in accordance with the statutes in that behalf render her irremovable, and she had not therefore gained a settlement in the West Ham Union.

A pauper, whose settlement both by birth and parentage was in the appelland union, had, before he was sixteen years of age, resided in another union for the term, in the manner and under the circumstances required by this section to acquire a settlement by residence. It was held that he had gained a settlement in the latter union, and was therefore irremovable from it (*Wolstanton and Burslem Union v. Northwich Union*, 1882, 46 J. P. 377; 46 L. T. 528).

By the 9 & 10 Vict. c. 66, s. 6, a person exempted from liability to be removed cannot by reason of such exemption acquire a settlement in any parish.

[An illegitimate child under sixteen resided with her mother in a parish for three years under circumstances which rendered her, by statute, irremovable. On reaching sixteen the question of settlement arose, and it was decided that she had acquired a settlement by residence (although entirely during the qualifying period under sixteen) (*Guardians of West Ham v. Guardians of Holbeach*, [1905] A. C. 450); so, too, an illegitimate child can, under 39 & 40 Vict. c. 61, s. 34, before the age of sixteen acquire a settlement by residence (under the requisite conditions) in a parish with its reputed father who is irremovable therefrom (*Guardians of Fulham v. Guardians of Woolwich*, [1907] A. C. 255; see also *Maidstone Union v. Wandsworth Union*, 1906, 4 L. G. R. 1052, and the note to the case on p. 1057).]

Apprenticeship.—If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation is adjudged a good settlement (3 Will. & Mary, c. 11, s. 7). But

an apprentice must reside in a place for forty days under the indenture in order to gain this settlement (31 Geo. II. c. 11). Where a boy was apprenticed, and served and resided in an extra-parochial place, it was held he gained no settlement by it (*Clerkenwell v. Bridewell*, 1699, 1 Raym. (Ld.) 549).

It is not necessary that the residence should be in the place where the apprentice was bound, nor where the master resides. This was so held in *St. Bride's v. St. Saviour's*, 1706, 2 Salk. 533, where a woman settled in the latter place took an apprentice, and afterwards took a lodging in the former place, where the apprentice resided, and served for more than forty days, the apprentice's settlement being adjudged to be in St. Bride's, although her mistress was not settled there. Inhabitation under a valid assignment is good (*R. v. Barnsley*, 1813, 1 M. & S. 377), and even if the assignment be bad, it will be deemed a service by consent of the master, and inhabitation during such service will gain a settlement (*R. v. Barleston*, 1822, 5 Barn. & Ald. 780). And where an apprentice has served under an agreement in writing and not under seal, and it is duly stamped, he acquires a settlement under 31 Geo. II. c. 11 (*Woodstock v. Shipston-on-Stour*, 1893, 57 J. P. 167). In order to gain a settlement by serving apprenticeship, there must be a real apprenticeship, *i.e.* where the object of the master is to teach, and of the apprentice to learn, a mere contract of hiring is not sufficient. Whether it is so or not is a question of fact for the sessions to determine (*R. v. Great Wishford*, 1835, 4 Ad. & E. 216).

Since the passing of the 4 & 5 Will. IV. c. 76, a settlement cannot be acquired by hiring and service (see s. 64). This section also abolished settlement by serving an office.

Estate.—If a person owns an estate in a parish, however small, which he has acquired otherwise than by purchase, and resides there for forty days, he gains a settlement. By the 9 Geo. I. c. 7, s. 5, if he has purchased the estate, he must *bonâ fide* have paid at least £30 for it in order to acquire a settlement by forty days' residence. A settlement by estate is not retained after the owner has ceased to reside within ten miles from the boundary of the parish in which it is situate. In such a case the pauper is liable to be removed to the place where he was previously settled, or to the place where he has subsequently gained one (4 & 5 Will. IV. c. 76, s. 68).

Renting Tenement, Paying Rates.—A settlement may be gained by renting or rating a tenement. The tenement must consist of a separate and distinct dwelling-house or building, or of land, or of both, *bonâ fide* by such person at a yearly sum of £10 at least, for the term of a whole year. The premises must be actually occupied, and the rent, to the extent of at least £10, actually paid for one whole year at least (6 Geo. IV. c. 57, s. 2; 14 Car. II. c. 12). A person renting and residing in a toll-house does not gain a settlement thereby (54 Geo. III. c. 170, s. 5), nor by residing in a charitable institution (*ibid.*, s. 6).

Marriage.—A woman on her marriage takes her husband's settlement by sec. 35 of 39 & 40 Vict. c. 61: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband." Where a wife resided with her husband in a parish for more than three years continuously, and after his death continued to reside as a widow in the same parish for three months, the settlement of the wife and her

children (who were all under six years of age) was held to be in that parish, the wife and children taking that settlement by virtue of sec. 35 (*Reigate Union v. Croydon Union*, 1889, 14 App. Cas. 465). Where a husband had never acquired a settlement for himself, it was held that he took his father's settlement, it not being derivative, and that the wife took the same settlement, and not the birth settlement of her husband (*West Ham Union v. St. Giles-in-the-Fields Overseers*, 1890, 25 Q. B. D. 272). A widow retains the settlement she had from her husband until she acquires another (Lord Watson in *Reigate Union v. Croydon Union*, 1889, 14 App. Cas. 482).

Parentage.—Settlement by parentage is now regulated by sec. 35 of the 39 & 40 Vict. c. 61. By that section no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except . . . in the case of a child under sixteen years, which shall take the settlement of its father or its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which they were born.

Where a father dies and a widowed mother does not subsequently acquire a settlement, a child under sixteen takes the father's settlement, and not the mother's maiden settlement (*Reigate Union v. Croydon Union*, 1889, 14 App. Cas. 465). Where the settlement of the father of a pauper child under sixteen could not be ascertained, the child may take its mother's settlement, although that settlement could not be determined without inquiring into her derivative settlement (*West Derby Union v. Atcham Union*, 1889, 24 Q. B. D. 117). An illegitimate child, like a legitimate child, cannot gain a settlement for itself while under the age of sixteen, but must follow the settlement of its mother (*Manchester Overseers v. Ormskirk Union*, 1890, 24 Q. B. D. 678). Where a child, after living in the appellant union with its father, who had acquired a settlement by residence there, removed with him into the respondent union, and while residing there with him as part of his family, attained the age of sixteen and became chargeable, it was held that the father, being irremovable, the child was not removable to the appellant union, by virtue of 11 & 12 Vict. c. 111, s. 1 (*Mitford Union v. Wayland Union*, 1890, 25 Q. B. D. 164). Where a father had acquired no settlement for himself since he attained the age of sixteen, and his father's settlement was a derivative one, it was held that a child who had become chargeable under the age of sixteen, and during his father's lifetime, was settled in the parish in which the child's father was born (*Bath Union v. Berwick-upon-Tweed Union*, [1892] 1 Q. B. 731). A child under the age of sixteen of a first marriage does not follow the settlement derived by its mother from a second marriage (*Llanelly Union v. Neath Union*, [1893] 2 Q. B. 38; see also 56 J. P. 483, 499, 515). Where the mother of an illegitimate child has a settlement, whether derivative or not, at the time of birth of the child the child takes that settlement. If subsequently, before the child attains

the age of sixteen, or, being a female, acquires a settlement by marriage, the settlement of the mother changes, whether by virtue of her acquiring a new settlement in her own right or by marriage, the settlement of the child changes likewise, and follows that of the mother. In this respect there seems to be still a difference between legitimate and illegitimate children. On the remarriage of the mother of legitimate children under sixteen, they do not take the settlement of the mother, which she acquires from her second marriage; but the illegitimate child of a woman who subsequently acquires a settlement by marriage does take that settlement if it is under sixteen, and has not, being a female, acquired a settlement by marriage (see 57 J. P. 4, 19).

Birth.—The place of birth is *primâ facie* the place of settlement of a poor person (*R. v. Heaton Norris*, 1796, 6 T. R. 653). In the words of Coleridge, J., in *R. v. All Saints, Derby*, 1849, 14 Q. B., at p. 217, "it is an established principle that every English subject has a birth settlement *primâ facie*; that is, till an acquired settlement is shown; until then it is no more than *primâ facie*; and when it is ascertained that the father or mother has an English settlement, that is the settlement of the child." And this will be so although the parents have no settlement (*R. v. Newchurch*, 1862, 32 L. J. M. C. 19), and whether the parents be natives of this country or of Scotland or Ireland (*R. v. Preston*, 1840, 12 Ad. & E. 822), or even of a foreign country. But by the 54 Geo. III. c. 170, s. 2, no person born in a prison or in a lying-in hospital shall be taken or deemed to have acquired a settlement thereby. In the case of a child born in a workhouse, such person shall, for the purposes of settlement, be deemed and taken to be born in the district, parish, township, or hamlet by whom the mother of such person was sent to, and on whose account the mother of such person was received and maintained in such house (54 Geo. III. c. 170, s. 3). And now, by the 7 & 8 Vict. c. 101, s. 56, the workhouse of a union is to be deemed to be in the parish to which each poor person therein is or has been chargeable (*R. v. St. Clements Danes*, 1862, 32 L. J. M. C. 25). By the 28 & 29 Vict. c. 79, s. 1, the relief of all classes of poor persons in unions is chargeable to the common fund of the union.

THE REMOVAL.

Guardians in unions may obtain orders of removal in respect of paupers settled elsewhere (28 & 29 Vict. c. 79, s. 2; *R. v. Northwich Union*, 1867, L. R. 2 Q. B. 383). Boards of guardians for single parishes under the 4 & 5 Will. IV. c. 76, s. 39, may be authorised by the Local Government Board to apply for orders and defend appeals in like manner as boards of guardians in unions (39 & 40 Vict. c. 61). Orders of removal may be defended and appealed against (28 & 29 Vict. c. 79, s. 3). Where the guardians of any union or parish are satisfied that any pauper is settled in and removable to their union or parish, they may consent to receive such pauper, and he may be removed without an order (*ibid.*, s. 6). Before a pauper is removed he, and such other witnesses as may be necessary to prove the settlement, should be examined before two justices of the county in which the removing union is situated. The examination should be taken down in writing. The attendance of the pauper may be enforced, if necessary, by summons or warrant. If the pauper is too ill or infirm to attend the examination, one justice of the peace may visit him and take his examination, and

report the same to the other justices acting for the district, and the latter may, upon such report, make an order (49 Geo. III. c. 124, s. 4).

The guardians applying for an order of removal must satisfy the justices, by evidence, of the facts necessary to entitle them to an order. Thus the residence of the pauper in their union at the time should be proved (*R. v. Rotherham*, 1842, 2 Q. B. 557*n.*; 12 L. J. M. C. 17), and a certificate of chargeability produced, as provided for by sec. 17 of the 5 & 6 Vict. c. 57. The order may be made by any two justices of the division in which the union is where the pauper is chargeable (35 Geo. III. c. 101, s. 1); but one justice may receive the complaint of the guardians (*R. v. Westwood*, 1718, 1 Stra. 73; 2 Bott, P. L. Cas. 631). The order should state on the face of it that the pauper was chargeable at the time of making it, and the name of the union or parish to which he had become chargeable (*R. v. Bourn*, 1735, 1 Burr. S. C. 39; *R. v. Ufeulm*, 1739, *ibid.* 138). By the 4 & 5 Will. IV. c. 76, s. 84, the cost of relief of a pauper by the removing union can be recovered back from the union he is adjudged to belong to, from the date of notice of chargeability. An order of removal may be abandoned by the guardians in whose favour it was obtained (11 & 12 Vict. c. 31, s. 8). Where the pauper is too ill to travel, the justices may suspend the order for removal (35 Geo. III. c. 101, s. 2, and 49 Geo. III. c. 124, s. 3). Where an order of removal, not suspended at the time of making it and not appealed against, cannot be executed at the expiration of twenty-one days by reason of the sickness of the pauper, the justices may make a fresh order of removal, and suspend the same without any formal *super-sedeas* or notice of abandonment of the previous order (56 J. P. 297).

An order of removal may be appealed against. The time and conditions for appealing against the removal of a pauper are regulated by the Poor Law Acts, and are not affected by the Summary Jurisdiction Acts (*R. v. Somersetshire JJ.*, 1889, 53 J. P. 470). The appeal lies to the general or Quarter Sessions of the county or borough wherein respectively the union or parish from which the pauper is to be removed is (8 & 9 Will. III. c. 30, s. 6; 45 & 46 Vict. c. 50, s. 165). By the 14 & 15 Vict. c. 105, s. 12, the guardians between whom there is any question affecting the settlement, removal, or chargeability of any pauper, may agree to submit it to the determination of the Local Government Board, and the decision of the Board will, as between the parties, be final and conclusive.

[In an action for recovery of expenses from one union by another the County Court is not the proper Court to decide a question of settlement (*Suffolk County Asylum v. Guardians of Nottingham*, 1905, 69 J. P. 120).]

Any person returning to or becoming chargeable to any parish from which he shall have been legally removed by order of two parties (unless he shall produce a certificate of the overseers of some other parish acknowledging him to be settled there) shall be deemed an idle and disorderly person, and may, on conviction, be imprisoned for any period not exceeding one calendar month (5 Geo. IV. c. 83, s. 3). And any person removed under an order of removal obtained by the guardians of any union returning to and becoming chargeable to such union again within the period of twelve months from such removal, without the consent of the guardians thereof, is to be deemed an idle and disorderly person within 5 Geo. IV. c. 83, and may be punished accordingly

(28 & 29 Vict. c. 79, s. 7; *R. v. Fillongley*, 1788, 2 T. R. 709; *R. v. Barham*, 1828, 8 Barn. & Cress. 99; *Mann v. Davers*, 1819, 3 Barn. & Ald. 103).

POOR NOT SETTLED IN ENGLAND.

(a) *Scotland, Ireland, Isle of Man, and Channel Islands.*—Persons born in Scotland or Ireland, or in the Isle of Man, or Scilly, or Jersey, or Guernsey, not settled in England, and becoming chargeable in England, by reason of relief given to himself or herself, or to his wife, or to any legitimate or bastard child, are liable to be removed to those places, if in such a state of health as not to be liable to suffer bodily or mental injury by the removal (8 & 9 Vict. c. 117, s. 2; 10 & 11 Vict. c. 33, s. 1; 24 & 25 Vict. c. 76, ss. 1, 2; 25 & 26 Vict. c. 113, ss. 1, 2). Every person authorised to take and convey any such poor person before justices has all the rights, privileges, powers, and immunities with which a constable is by law invested (10 & 11 Vict. c. 33, s. 3). Such poor persons cannot be removed if they have resided the specified time (see *ante*, p. 274) in a parish in England. Where children born in England of an Irish father and an Irish mother became chargeable, while under sixteen, after the father had deserted them and the mother had died, it was held that they were removable to the parish of their birth, the Act 8 & 9 Vict. c. 117, s. 2, *supra*, not making English-born children removable directly, but only as part of the family of a parent who is removed (*R. v. All Saints, Derby*, 1849, 14 Q. B. 207; 19 L. J. M. C. 14; 14 J. P. 3). Where an Irishman, having no English settlement, married a woman settled in A., and lived with her in B. in England for more than five years, and then deserted her and left the kingdom, it was held that she was removable from B. to A., and not to Ireland (*Much Hoole v. Preston*, 1851, 17 Q. B. 548; 21 L. J. M. C. 1; 16 J. P. 212). Similarly, a daughter becoming chargeable in a different parish from that in which her parents, who were Irish without a settlement, resided, is not removable to Ireland, but to her birth settlement in England (*R. v. St. Giles, Cripplegate*, 1851, 21 L. J. M. C. 26; 15 Jur. 1154; 16 J. P. 244). Where a husband born in Ireland had deserted his wife and children, it was held that they could not be removed to Ireland without the husband, who was the head of the family (*Poor Law Commissioners of Ireland v. Liverpool*, 1869, L. R. 5 Q. B. 79; 39 L. J. M. C. 251; 34 J. P. 294). See *R. v. Leeds*, 1821, 4 Barn. & Ald. 498; *R. v. Cottingham*, 1827, 7 Barn. & Cress. 615, as to the law before the passing of the 8 & 9 Vict. c. 117.

(b) *Foreign Poor.*—A foreigner may gain a settlement (*R. v. Eastbourne*, 1803, 4 East, 103), but until he has gained a settlement the union to which he becomes chargeable is liable to maintain him (*St. Giles v. St. Margarets*, 1715, 1 Sess. Ca. 97; *Ellinor Cowred's Case*, 1695, Comb. 287; 2 Bott P. L. Cas. 17).

[*Liability of Guardians to their Servants and to Paupers in Case of Accident.*—"Employer" in the Workmen's Compensation Act, 1906, 6 Edw. VII. c. 58, includes any corporate body such as a board of guardians, and sec. 13 of the Act provides that the exercise and performance of the powers and duties of a local or other public authority shall be treated as the trade or business of the authority. The Local Government Board has given authority to boards of guardians to insure against the risks of the Act (Cir. Lett. May 16, 1907). As to the

liability in case of accident to a pauper performing work for a board of guardians see *Tozeland v. Guardians of West Ham*, [1906] 1 K. B. 538.]

Rating.—For the law on this point see GUARDIANS OF THE POOR; OVERSEERS; RATING.

[*Authorities.*—Archbold's *Poor Law*, 1898, 15th ed. (Brook Little); Burn's *Justice of the Peace*, vol. iv., "Poor," 13th ed., 1869; Macmorran and Lushington's *Poor Law General Orders*, 1905 ed.; Steer's *Parish Law* (Macnamara), 1899 ed.; Little's *Poor Law Statutes*, 1902 ed.; Vulliamy's *Law of Settlement and Removal*, 2nd ed., 1906.]

ACCOUNTS OF OVERSEERS, ASSISTANT OVERSEERS, AND COLLECTORS OF POOR RATES.¹

Instructions as to the Mode of Appealing to the Local Government Board against Disallowances and Surcharges by a District Auditor.

1. Persons from whom a district auditor certifies any money to be due in accounts relating to the undermentioned rates, unless they appeal against the auditor's decision, are required by law to pay over the money certified within seven days from the date of the certificate, as hereinafter mentioned:—

(a) Money certified in the poor-rate accounts must be paid to the union treasurer, except where the sum, or the aggregate of the sums, disallowed is less than £2, in which case the money may be paid over with the balance to the succeeding overseers.

(b) Money certified in the separate sanitary rate account must be paid to the treasurer of the rural district council.

(c) Money certified in the lighting rate account must be paid to the treasurer of the lighting inspectors, or other authority for the execution of the Lighting and Watching Act, 1833.

(d) Money certified in the separate burial rate account must be paid to the treasurer of the burial board, or other authority for the execution of the Burial Acts.

2. Any person affected by a district auditor's certificate of disallowance or surcharge may, if he feels aggrieved by the auditor's decision, appeal to the Local Government Board, who, upon the receipt of the appeal are empowered to decide as to the lawfulness of the reasons stated by the auditor for his decision; and where they uphold the disallowance or surcharge, they may, upon payment of the costs (if any) incurred by the auditor in taking steps to enforce payment of the money certified, remit the disallowance or surcharge if they consider that the subject-matter of it was incurred under such circumstances as make it fair and equitable that this course should be taken.

3. Any person desiring to appeal must, unless the auditor has already entered his reasons in the book of accounts in which the disallowance or surcharge was made, apply to him to enter his reasons in that book; and for this purpose the book should be submitted to him.

4. When the auditor has entered his reasons, an exact copy of them, and also a copy of his certificate of disallowance or surcharge, including his signature and the date of the entry, should be forwarded to the Board with the appeal.

¹ These instructions are issued officially by the Local Government Board.

5. The appeal should be by letter on foolscap paper, addressed to the Secretary of the Local Government Board, Whitehall, London, and must be signed by the appellant in his own handwriting. When two or more persons are mentioned in the auditor's certificate, the appeal should be signed by each of those desirous of appealing.

6. The appeal should contain a full statement of the facts which the appellant may desire to lay before the Board, and the grounds upon which the appeal is made should be explicitly set out. If there are any—

- (1) Bills;
- (2) Vouchers; or
- (3) Other papers or documents

bearing upon the matter they should be forwarded to the Board with the appeal.

S. B. PROVIS, *Secretary*.

LOCAL GOVERNMENT BOARD,
July 1899.

MEMBERS AND OFFICERS OF LOCAL AUTHORITIES.

Instructions as to the Mode of Appealing to the Local Government Board against Disallowances and Surcharges by a District Auditor.

1. If a person affected by a district auditor's certificate of disallowance or surcharge is aggrieved by the decision of the auditor, he may appeal against it to the Local Government Board.

2. The Board, upon appeal being made to them, are empowered to decide as to the lawfulness of the reasons stated by the auditor for the disallowance or surcharge, and where they uphold his decision they may, upon payment of the costs (if any) incurred by the auditor in taking steps to enforce payment of the money certified, remit the disallowance or surcharge, if they consider that the subject-matter thereof was incurred under such circumstances as make it fair and equitable that this course should be taken.

3. If the person aggrieved decides to appeal he must, unless the auditor has already entered his reasons in the book of account in which the disallowance or surcharge was made, apply to the auditor to enter his reasons in that book, and for this purpose the book should be submitted to the auditor.

4. When the auditor has entered his reasons an exact copy of them, and also a copy of the auditor's certificate, including his signature and the date of the certificate, should be forwarded to the Board with the appeal.

5. The appeal should be by letter on foolscap paper, addressed to the Secretary of the Local Government Board, Whitehall, London, and must be signed by the appellant in his own handwriting. Where two or more persons are mentioned in the auditor's certificate, the appeal must be signed by each of those desirous of appealing.

6. The appeal should contain a full statement of the facts which the appellant may desire to lay before the Board; and the grounds upon which the appeal is made should be explicitly set out. If there are any—

- (1) Cheques;
- (2) Bills;

- S. B. PROVIS, *Secretary.*

Medical Officer of the Workhouse.

II.

JUSTICE'S ORDER FOR THE DETENTION OF LUNATIC IN WORKHOUSE.¹

I, the undersigned C. D., a justice of the peace for _____, being satisfied that A. B., a pauper in the _____ Workhouse of the _____, is a lunatic [*or* idiot or person of unsound mind] and a proper person to be taken charge of under care and treatment in the workhouse, and being satisfied that the accommodation in the workhouse is sufficient for his proper care and treatment separate from the inmates of the workhouse not lunatics [*or*, that his condition is such that it is not necessary for the convenience of the lunatic or of the other inmates that he should be kept separate], hereby authorise you to take charge of, and, if the workhouse medical officer shall certify it to be necessary, to detain the said A. B. as a patient in your workhouse.

Subjoined is a statement of particulars respecting the said A. B.

(Signed) C. D.,
A Justice of the Peace for _____.

Dated _____.

To the Master of the _____ Workhouse _____ of the _____.

Statement of Particulars.

Name of patient and Christian name at length.

Sex and age.

Married, single, or widowed.

Condition of life and previous occupation (if any).

Religious persuasion as far as known.

Previous place of abode.

Whether his first attack.

Age (if known) on first attack.

When and where previously under care and treatment.

Duration of existing attack.

Supposed cause.

Whether subject to epilepsy.

Whether suicidal.

Whether dangerous to others.

Whether any near relative has been afflicted with insanity.

Name and Christian name and address of nearest known relative of the patient, and degree of relationship if known.

I certify that to the best of my knowledge the above particulars are correct.

(To be signed by the relieving officer).

¹ See secs. 24, 33 of Lunacy Act, 1890.

III.

MEDICAL CERTIFICATE ON LUNATIC OR IMBECILE PAUPER.

[*Being the Metropolitan Asylum District (Asylums for Imbeciles) Regulations, Schedule Form (B) (Article 3) February 10, 1875.*]

I, the undersigned, do hereby certify that I have this day personally examined _____, a person chargeable to the _____ Union [or Parish of _____], and that the said _____ is, in my opinion, a chronic and harmless lunatic, idiot, or imbecile, such as might lawfully be retained in a workhouse, and a fit person for admission into the _____ Asylum at _____; and that I have formed this opinion upon the following grounds, viz.:—

1. Facts observed by myself. [*Here state facts.*]
2. Facts (if any) communicated to me by others. [*Here state the information, and from whom obtained.*]

I hereby certify that the said _____ is not at the present time, to the best of my belief, suffering from any contagious or infectious disease, and that in my judgment, after examination duly made for that purpose, the journey to the asylum is not likely to prove detrimental to him, either by reason of advanced age or in consequence of his being afflicted by disease of the heart, lungs, or other organ.

Medical Officer of the _____ District (or Workhouse) of the _____ Union (or Parish of _____).
Dated this _____ day of _____ 19 .

IV.

[*Being Form (C) (Article 3) of the Regulations of February 10, 1875. See headnote to Form III. supra.*]

Report to Guardians to be signed by the Chairman, Vice-Chairman, or a member of the Visiting Committee of the Board of Guardians of the union or parish from which a pauper is to be sent to an asylum.

I, the undersigned, being _____ of the _____ Union [or Parish], having, on the _____ day of _____ 19 , personally seen _____, a pauper residing in the said union [or parish], proposed to be sent to the _____ at _____, do hereby declare that I am satisfied that the said _____ is a proper person to be sent to that asylum.

(Signature.)

Date _____

V.

FORM OF CONTRACT OR AGREEMENT BETWEEN THE MANAGERS OF A TRAINING SHIP AND A BOARD OF GUARDIANS CONCERNING BOYS SENT TO THE SHIP.¹

Articles of Agreement, made the _____ day of _____ 19 , between the Managers of the _____ (hereinafter

¹ This form is set out as a schedule to the Metropolitan Asylum District Training Ship "Exmouth" Amending Regulations, June 15, 1892.

called the Managers), for themselves and for their successors of the one part, and the Guardians of the Poor of the _____, in the county of _____ (hereinafter called the said Guardians), for themselves and their successors of the other part.

Whereas the Managers have a training ship situated in the River Thames, off Grays, in the county of Essex, on board which there is adequate provision for the reception, maintenance, education, and training of poor boys, and on which there is more accommodation than the Managers require for poor boys of the _____.

And whereas the said Guardians have applied to the Managers to receive on board, and to clothe, maintain, instruct, and to train for the sea service while on board the said training ship, a certain number of poor boys between the ages of thirteen and fifteen years chargeable to the said _____.

Now, therefore, the Managers, with the consent of the Local Government Board, testified by their official seal being hereunto affixed, do hereby (in consideration of the payments hereinafter mentioned to be made) contract and covenant with the said Guardians that they, the Managers, will receive on board the said training ship, and will clothe, maintain, instruct, provide with medical attendance, and train for the sea service, whilst on such training ship, a certain number not exceeding _____ poor boys between the ages of thirteen and fifteen years of age chargeable to the said _____, being orphans or deserted by their parents, or whose parents or surviving parents shall consent to their being received on board such training ship, and upon the completion of their training to their entering the Royal Navy or the Mercantile Marine Service, and that such boys while on board the said training ship shall be clothed, maintained, instructed, provided with medical attendance, and trained for the sea service in the same manner in all respects as the boys belonging to the _____ at the following rate of charge, namely, the sum of nine shillings per week, and after the same rate for any less time than a week, for each boy, each week to commence on the day of admission on the said training ship.

Provided that the limit hereinbefore prescribed for the number of boys to be admitted on the said training ship may be increased or diminished by the parties hereto.

And the said Guardians do hereby covenant with the Managers to pay to the Managers the said sum of nine shillings per week, and after the same rate for less time than a week, for each of the boys received from the said _____ on the said training ship, so long as such boy shall remain on board; and also that upon the discharge to the sea service of any boy received from the said _____, the said Guardians will pay to the Managers the expense of the outfit of such boy.

And it is hereby mutually agreed by and between the parties hereunto that no boy from the said _____ shall be admitted on board the said training ship without a certificate from a medical officer of the said _____ (to be countersigned by the medical officer of the said training ship) to the effect that such boy is free from disease, and fit, as regards his bodily and mental condition, for training for the sea service.

Also that except where a boy ceases to be chargeable as aforesaid, or

his parent, being an inmate of the workhouse of the Union [Parish], shall have given reasonable notice of his intention to quit such workhouse, the said Guardians will not remove any boy from the said training ship without a request in writing addressed to the Captain-Superintendent of the said training ship, and signed by the Clerk or the Acting Chairman of the Guardians, and forwarded two weeks before the day when the removal is to take place.

Also that if it shall appear to the Managers that it is undesirable that any boy received under this agreement should remain on board, the Managers shall give notice of their intention to remove such boy, with a statement of the grounds thereof, to the clerk of the said Guardians, and shall, within one week from the date of such notice, at the expense of the said Guardians, remove such boy to the workhouse of the said Guardians.

And further, that in the event of the death of any boy received from the said Guardians, the Managers will cause such boy to be buried, and the said Guardians will repay to the Managers the expense of such burial.

And lastly, it is hereby covenanted and agreed that if either of the said parties hereto shall be desirous of putting an end to this contract the party so desirous shall give one calendar month's notice thereof in writing to the other of them.

In witness whereof the said parties have hereunto respectively set their common seal.

The seal of the Guardians of the Poor of the was hereto
affixed at an ordinary meeting held on the .

Clerk.

The seal of the Managers of the _____ has been hereto affixed in accordance with a resolution passed by the Managers on the _____.

Clerk.

The seal of the Local Government Board was hereto affixed this

[NOTE.—Forms VI. to X. inclusive are taken from the Schedule to the Boarding-out Order, 1905.]

VI.

ENGAGEMENT BY PROPOSED BOARDING-OUT COMMITTEE.

We, the undersigned, being desirous of being constituted a Boarding-out Committee for the purpose of finding and superintending homes within an area comprising the parish or parishes specified below, for such pauper children as may be boarded-out by Boards of Guardians under the provisions of the Boarding-out Order, 1905, do hereby engage that, *in the event of our obtaining the requisite authority of the Local Government Board to act as a Boarding-out Committee*, we will truly and faithfully observe the Regulations which are prescribed in the said Order, or which may from time to time be prescribed by the Local Government Board with respect to the boarding-out of pauper children.

And we do also hereby undertake to furnish to the Local Government Board, or to any of the Inspectors of that Board, all such reasonable information respecting pauper children who may be boarded-out under the superintendence of the Committee, as the said Board or Inspectors may from time to time require.

And we do also engage that meetings of the Committee shall be held not less often than _____ at _____, on days to be fixed by the members of the Committee at the first meeting in each year, the days and place of meeting to be subject to such alterations as may be agreed upon at one of the ordinary meetings of the Committee after due notice to every member, and further that a book shall be kept containing a record of the proceedings at each meeting, and that the minutes of the last meeting shall be read at the next succeeding meeting and signed by the presiding chairman, who shall be a member of the Committee other than the person appointed to act as secretary.

AREA OF ACTION OF COMMITTEE.

Parishes of which Area Consists.	Union comprising Parishes.	County.

Signatures in Full.	Rank, Profession, or Calling. ¹	Addresses.

Dated this _____ day of _____ 19 .

To the Secretary,
Local Government Board,
Whitehall, London, S.W.

¹ In the case of any lady member having no calling or profession of her own, the rank, profession, or calling of the lady's husband or father should be entered in this column thus :—

Wife, widow, or daughter of a

VII.

ENGAGEMENT BY PROPOSED MEMBERS OF BOARDING-OUT COMMITTEE.

, the undersigned, being desirous of becoming member of the Boarding-out Committee formed for the purpose of finding and superintending homes within an area comprising the parish or parishes specified below, for such pauper children as may be boarded-out by Boards of Guardians under the provisions of the Boarding-out Order, 1905, do hereby engage that we will truly and faithfully observe the regulations which are prescribed in the Boarding-out Order, 1905, or which may from time to time be prescribed by the Local Government Board with respect to the boarding-out of pauper children.

And , do also hereby undertake to furnish to the Local Government Board, or to any of, the Inspectors of that Board, all such reasonable information respecting pauper children who may be boarded-out under the superintendence of the Committee, as the said Board or Inspectors may from time to time require.

AREA OF ACTION OF COMMITTEE.

Parishes of which Area Consists.	Union comprising Parishes.	County.

Signatures in Full.	Rank, Profession, or Calling. ¹	Addresses.

Dated this day of 19 .

To the Secretary,
Local Government Board,
Whitehall, London, S.W.

¹ In the case of any lady member having no calling or profession of her own, the rank, profession, or calling of the lady's husband or father should be entered in this column thus:—

Wife, widow, or daughter of a .

VIII.

BOARDING-OUT COMMITTEE.

Statement to be sent to the Local Government Board showing the names and addresses of the Members of the above Committee on the 1st January (or 1st July), 19 .

NOTE.—The Statement is to be sent in half-yearly. Strike out the words 1st January or 1st July, as the case may be.

Names. ¹	Addresses.

(Signed)

Secretary of Committee.

To the Secretary,
Local Government Board,
Whitehall, London, S.W.

Date .

IX.

AGREEMENT entered into between THE BOARDING-OUT COMMITTEE of , in the Count of (hereinafter called the "Committee"), of the one part and THE BOARD OF GUARDIANS of , in the Count of (hereinafter called the "Guardians"), of the other part.

We, the Committee, do hereby agree with the Guardians as follows:—

That we will undertake to find homes and foster-parents for children to be sent to us by the Guardians, and for so many more children as may hereafter, with the approval of the Local Government Board, be agreed upon between ourselves and the Guardians:

That we will cause each of the children placed with the said foster-parents and their respective homes to be visited not less often than once in every six weeks, by at least one member of the Committee, and will send a report to the Guardians of the apparent bodily condition and behaviour of each child, and of all complaints made by or concerning the child against or by the foster-parents not less often than once a quarter:

¹ It will be convenient if the names are arranged in alphabetical order.

That at each visit the visitor shall duly inspect the clothing of the child and shall ascertain whether the quarterly sum allowed by the Guardians for the repair and renewal of the said clothing is properly expended :

That we will make arrangements with a duly qualified medical man for attendance upon the said children in case of sickness, and for the supply of the necessary medicines :

That we will also make arrangements with a duly qualified dentist for the care of the children's teeth :

That, in case at any time any of the said children should die, we will cause the deceased child to be decently and properly buried :

That we will truly and faithfully observe all regulations prescribed in the Boarding-out Order, 1905, or otherwise from time to time prescribed by the Local Government Board with respect to the boarding-out of pauper children.

That we will, upon the demand of a person duly authorised in writing by the Guardians, give up possession of any of the said children who may be under our custody or control.

And we, the Guardians, do hereby on our part undertake and agree with the Committee as follows :—

That, when suitable homes and foster-parents have been found for the said children, and the undertaking required by Art. VI., No. 9, of the Boarding-out Order, 1905, to be signed by the foster-parent before receiving any child shall, in the case of each child, have been forwarded to us by the Committee, we will provide every such child, with a proper outfit of clothing and the Committee shall be authorised, in the case of every such child, to make on our behalf the following payments ; namely,—

- (a) The sum [*not exceeding* [] *shillings*] inserted in the said undertaking as the amount to be paid for the weekly maintenance of the said child.
- (b) A sum not exceeding per quarter for the repair and renewal of the child's clothing.
- (c) Such a sum, not exceeding two shillings and sixpence per quarter for the schooling of the child, as the Committee shall find necessary.
- (d) A sum, not exceeding one penny per week, to be paid as a remuneration to the schoolmaster of the school at which the child attends, for drawing up and sending the quarterly report upon the said child as prescribed by the Boarding-out Order, 1905.

That we will remit quarterly to the Committee the sum of money required to reimburse them all moneys expended and payments made as aforesaid on our behalf, and a sum of one penny per week for each child, to meet other expenses incurred by the Committee, in respect of the child. Provided that where we advance a sum to the Committee under the provisions of the Boarding-out Order, 1905, the amount so advanced shall be taken into account in making the remittance aforesaid. [*Here insert a statement of such conditions as the Guardians impose with regard to the production of Vouchers.*]

That in consideration of the Committee making suitable arrangements, as hereinbefore agreed, with a duly qualified medical man for attendance upon the said child in case of sickness, and for the supply of necessary medicines, we will pay to the Committee the sum, not exceeding _____ in a year (unless on a special report of the case we consent to a further expenditure), which has been disbursed by the Committee for medical attendance on and medicine for the child, and any further sum which has been disbursed by the Committee for the purpose of providing such extra nourishment or medical or surgical appliance for a child in case of sickness as shall have been ordered by the medical man aforesaid and certified by a member of the Committee.

That, in consideration of the Committee making suitable arrangements with a duly qualified dentist for the care of the children's teeth we will pay to the Committee such cost as may have been reasonably expended for the purpose.

That in consideration of the Committee undertaking that, in case any of the said children at any time while boarded-out as aforesaid should die, the Committee will cause every child so dying to be decently and properly buried, we will pay to the Committee, if the child so dying were not more than ten years of age at the time of death, such sum, not exceeding twenty-five shillings, and if the child were more than ten years of age at the time of death, such sum, not exceeding forty shillings, as has been disbursed by the Committee for burial purposes.

And we, the Guardians, do hereby further agree with the Committee, that if any child shall at any time after being placed with a foster-parent be found to be suffering from any incurable bodily disease, or from lunacy, or shall in the judgment of the Committee be incorrigible and of confirmed bad habits, we will in every such case, upon the same being duly signified to us, cause the said child to be removed from the home wherein it may be boarded-out as aforesaid, and to be conveyed at our own expense to the workhouse of the said

_____, or to a lunatic asylum, as the circumstances of the case may require.

In witness whereof the presiding chairman and secretary of the Committee have hereunto set their hands, this _____ day

of _____ 19 _____, and the Guardians their common seal, this _____ day of _____ 19 _____.

Signatures of the presiding chairman and secretary of the Committee.

The common seal of the Guardians was hereunto affixed at a meeting of the Board of Guardians held on the day last aforesaid, by _____, chairman of the Board (L.S.) at the said meeting, in the presence of _____, the clerk to the Guardians.

X.

UNDERTAKING OF FOSTER-PARENT.

BOARDING-OUT OF CHILD in a HOME beyond the limits of the POOR LAW UNION to which such child is chargeable.

Poor Law Union.

Boarding-out Committee.

Name of Child.

Religious Creed of Child.

Name of Foster-Parent.

I, A. B., of _____ do hereby engage with the Guardians of the above-named Poor Law Union, in consideration of my receiving the sum of _____ per week, to bring up C. D., aged _____ years on the _____ day of _____ last, as one of my own children, and to provide h _____ with proper food, lodging, and washing, and to endeavour to train h _____ in habits of truthfulness, obedience, personal cleanliness, and industry; to take care that the child shall attend duly at church [*or chapel*¹] and school; that I will provide for the proper repair and renewal of the child's clothing, and that, in case of the child's illness, I will forthwith report the illness to the above-named Boarding-out Committee; and that I will at all times permit the child to be visited and the home to be inspected by any member of the Boarding-out Committee, and by any person specially appointed for that purpose by the Guardians or by the Local Government Board. I do also hereby engage, upon the demand of a person duly authorised in writing by the Boarding-out Committee or by the Guardians, to give up possession of the child.

2

Dated this _____ day of _____ 19 .

Signature (in full) of Foster-Parent.

Address of Foster-Parent.

Witness to the signature of the Foster-Parent.

Address of Witness.

N.B.—Communications to the Boarding-out Committee to be addressed _____.

¹ Insert "church," "chapel," or according to the religious creed to which the child belongs.

² Any other matter which may be agreed upon may here be added.

Pope (in Latin *papa*).—A title originally applied familiarly to all bishops of the Catholic Church, but now borne exclusively by the Bishop of Rome. The Pope is officially described as “Holy Father,” “Vicar of Christ,” “Sovereign Pontiff,” is usually addressed as “Your Holiness,” and describes himself when signing as *Servus servorum Dei*.

Though the Pope has no recognised status in Great Britain, and no control is exercised, as elsewhere on the Continent (see CONCORDAT), by the State over Roman ecclesiastical authorities as such, there are still many provisions in the statute-book affecting the Pope and papists.

From exorbitant powers at one time claimed in England by the Popes were derived the famous Statutes of *Præmunire*, “framed,” says Blackstone, “to encounter this overgrown yet increasing evil.” They date back to long before the Reformation. Open resistance to the Pope, in fact, seems to have begun with Edward I., who “would not suffer his bishops to attend a general council, till they had sworn not to receive the papal benediction. He made light of all papal bulls and processes, attacking Scotland in defiance of one, and seizing the temporalities of his clergy who, under pretence of another, refused to pay a tax imposed by Parliament. He strengthened the Statutes of Mortmain, thereby closing the great gulf, in which all the lands of the kingdom were in danger of being swallowed. And, one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed as a traitor according to the ancient law. And in the thirty-fifth year of his reign was made the first statute against papal provisions, which, according to Sir Edward Coke, is the foundation of all the subsequent Statutes of *Præmunire*; which we rank as an offence immediately against the King, because every encouragement of the papal power is a diminution of the authority of the Crown” (*Commentaries*, bk. iv. ch. viii. p. 111, edition 1770).

This statute was followed by others in a similar sense, one of which, adopted in the reign of Richard II., still in force (16 Rich. II. c. 5), is in particular called *the Statute of Præmunire*, from the words of the writ preparatory to the execution thereof. This term has since come, not only to denominate the writ, but also the offence itself, *i.e.* the offence of in any wise maintaining the papal power; and the penalties attaching to it are called penalties of *præmunire*. The offence consists, says Blackstone, in “introducing a foreign power into this land, and creating *imperium in imperio* by paying that obedience to papal process which constitutionally belonged to the King alone.” Thus are forbidden, under pain of *præmunire*, the collation or provision by the See of Rome to an archbishopric, bishopric, dignity, or benefice, and the introduction of provisions by writ of *exigent* (25 Edw. III. st. 4; 38 Edw. III. st. 2; 12 Rich. II. c. 15; 13 Rich. II. st. 2, cc. 2, 3; 2 Hen. IV. c. 3; 25 Hen. VIII. c. 20; 1 Eliz. c. 1); and purchase or use of, or acting under processes, sentences of excommunication, bulls, dispensations, licences, etc. (16 Rich. II. c. 5; 25 Hen. VIII. c. 20; 25 Hen. VIII. c. 21; 28 Hen. VIII. c. 16; 1 Eliz. c. 1; 13 Eliz. c. 2; and 9 & 10 Vict. c. 59).

There are also provisions in the statute-book against suits and appeals to the See of Rome (38 Edw. III. st. 2; 13 Rich. II. st. 2; 24 Hen. VIII. c. 12; 25 Hen. VIII. c. 19; 1 Eliz. c. 1); against payments to the See of Rome of pensions or Peter’s pence (25 Hen. VIII. c. 21; 1 Eliz. c. 1), or of first fruits (23 Hen. VIII. c. 20; 25 Hen. VIII. c. 20; 1 Eliz. c. 1); and against the observance of papal interdicts (24 Hen. VIII. c. 12; 1 Eliz. c. 1).

Roman Catholics were formerly under certain disabilities, which have now for the most part been removed (see ROMAN CATHOLIC), leaving them free to exercise their religion, and to devise their own ecclesiastical machinery and organisation, including episcopal supervision of *quasi*-territorial dioceses. For ecclesiastical law before the Reformation, see CANON LAW.

Since 1870 the Pope has ceased to be a temporal sovereign, and his legal position in Italy is now regulated by the Law of Papal Guarantees of May 13, 1871, by which, *inter alia*, the sanctity and inviolability of his person, the free enjoyment of the Vatican and Lateran Palaces, with all edifices, gardens, and property appertaining to them, and the papal country residence, are declared exempt from the Italian jurisdiction (see EXTERRITORIALITY). The Pope's sovereign status and independence, in particular, are specially acknowledged in the preservation of his right of embassy (see LEGATE; NUNCIO). No restriction, moreover, is placed upon his free correspondence with the episcopate and the whole Catholic Church. But every appeal to the temporal power is abolished, and the employment of any secular compulsion is now excluded from ecclesiastical measures (see a full description of the law of guarantees in Geffcken's *Church and State*).

On the Continent the papal see is still a power to be reckoned with throughout the Roman Catholic world, and it has never ceased to endeavour to exercise its power to influence the temporal affairs of mankind generally.

"The necessary postulates for this," says Geffcken, "were the divine origin of its constitution, and the secular independence of its head. The Reformation, which denied the first, stripped the Roman Church of a large province of authority; but over the territory she still retained her sway was all the more secure, and the temporal rule of the Pope remained untouched. The philosophy of the eighteenth century weakened the Church internally, but from the ordeal of the Revolution she came forth with fresh strength and vigour, and understood how to utilise every stage of that grand progress, which began with 1789, to re-establish and extend her shattered power. If, after the lapse of fifty years she looked back upon what she had gained, she had every reason to contemplate her progress with satisfaction" (*Church and State*, p. 294).

Then began her great struggle against modern thought, the first result of which was the famous Encyclical of December 8, 1864, and the syllabus appended to it detailing the errors condemned by the papal see. "In a motley crowd," says Geffcken, "this catalogue comprehends not only those doctrines which contradict beyond all dispute the Christian revelation and civil order, but those also which form the very pith and marrow of our modern civilisation." (For fuller particulars, see his book, pp. 297 *et seq.*)

Of late years the contemporary spirit of intellectual compromise seems to have invaded even the Roman Church. It has once more endeavoured to lead all men, and, as in the Middle Ages, when the Popes acted as peacemakers among nations, adjusting differences between Sovereigns, between Sovereigns and cities, and between Suzerains and vassals (see ARBITRATION, INTERNATIONAL), so the Pope seeks to regain a position in the civilised world as a mediator and arbitrator in the affairs of mankind, a position which, by the way, but for the suppression of his temporal power, would have been impossible.

[*Authorities*.—Geffcken, *Church and State*, trans. by Fairfax Taylor London, 1877; Nys, *The Papacy and International Law*, London, 1879; Holtzendorff, *Handbuch des Völkerrechts*, Hamburg, 1887 ("Papst," by Prof. Geffcken); Piédelièvre, *Précis de droit International Public*, Paris, 1895 (Appendix: "De La Papauté en Droit International").]

Popery.—See POPE; ROMAN CATHOLIC.

Popular Action.—See QUI TAM.

Port.—Lord Hale defines a port thus: "A port is a haven and somewhat more. First, it is a place for arriving and unlading of ships and vessels. Second, it hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shown. Third, it hath a ville, or city, or borough, that is the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their goods, and victualling their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz. an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade; something that is artificial, as keys, wharfs, cranes, warehouses, and houses of common receipt; and something that is civil, viz. privileges and franchises, viz. *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority" (*De Portubus*; Hargreaves, 46, quoted by Lord Halsbury, *Hunter v. Northern M. I. C.*, 1888, 13 App. Cas. 717, 722).

Ports are the *ostia regni*, and every public port is a franchise or liberty, as a market or a fair, and much more, and their creation belongs to the Royal prerogative. No subject can set up a public port without charter from the Crown or lawful prescription which approves such a charter, not even the lord of a county palatine within his palatine jurisdiction. A port may belong to a subject, both as regards franchise, *i.e.* the right to charge tolls on persons making use of it, and as regards the soil below its waters. There is a threefold right in ports, viz. the *jus privatum*, or the right of property in the port, whether franchise or soil, from which arise the port duties, such as anchorage, ballastage, burselage, keelage, lestage, prisage, and shore duties, such as towage, moorage, terrage, cranage, wharfage and quayage, houselage, and tolls, such as tronage or pesage and measurage; the *jus publicum*, or right of the public to have the port maintained in good order and free from hindrances to navigation; and the *jus regium*, or the right of the Crown of exercising superintendence over it, for the purpose of preserving the peace and safety of the kingdom, its commerce and trade, and the revenue and customs (Hale, *De Portubus*, *passim*). A port cannot be abolished except by Act of Parliament, unless it becomes totally unuseful by accident, as being sanded or stopped up by the sea (Hale, *First Treatise*; Moore, *Foreshore*, 327).

Hale elsewhere says: "A subject having a port of the sea may have, and in common experience and presumption hath, the soil of the port covered with water, for though the franchise differs from the propriety of the soil and the franchise may be in the subject and the propriety of the soil in the King or some other, in ordinary usage and presumption they go together. If the King at this day grant *portum maris de S.*, the King having the port in point of interest as well as in point of franchise,

it may be doubtful whether at this day it carries the soil or only the franchise. But if it were an ancient grant, and usage had gone along with it that the grantee held also the soil, this grant might be effectual to pass both, for both are included in it. So if by prescription and custom a man hath *portum maris de S.*, in ordinary presumption he hath not only the franchise but also the very soil and water of the port, for *portus maris* is *quid aggregatum*, and such a presumption may carry soil as well as franchise; and though this doth not always hold, yet most times it doth" (*De Jure Maris*; Hargreaves, 33; Moore, 401). Stuart Moore, commenting on this passage, says this is generally the case where the port has belonged to an ancient barony, for grants of ports are more recent than grants of shore and soil, and therefore, generally, the franchise is added to the property (811); but the ownership of the soil is not necessary to the exercise of the franchise of a port, and it is very rare to find the franchise and the ownership of the port in the same hands, and owners who have only the franchise may take duties, groundage, and anchorage; and usually where the franchise of a port has been granted to the corporation of a town or city, the soil of the port is in the lords of the manors abutting upon it (Moore, 697, 809, 811).

The limits of a port vary according to the purpose for which it is instituted; and a port for fiscal purposes is not the same as it is for (municipal or) local purposes, or for pilotage, or for commercial purposes (approved by Kekewich, J., *Assheton Smith v. Owen*, 1904, 20 T. L. R. 755; and see *ibid.*, [1906] 1 Ch. 179; [1907] A. C. 124, as to limit of fiscal or local port). There is a great distinction between local ports, the franchise of which may have been granted to a subject, and royal (or fiscal) ports remaining in the Crown. The former are usually confined to the matter of the rivers in which they are situate; the latter extend along the coast, and vary in extent from time to time by Royal Commission to suit the necessities of the public service; thus the local port of Plymouth extends to the Mewstone (outside the breakwater), but the fiscal port extends some miles along the coast outside the limits of the ancient local port (Moore, 829). The revenue port of Cardiff extends sixty miles down the Bristol Channel, but the ancient local port perhaps not farther than between Penarth and Bute Docks (*Sailing Ship Garston Co. v. Hickie*, 1885, 15 Q. B. D. 580); and similarly with the case of Greenock (*Hunter v. Northern M. I. Co.*, 1888, 13 App. Cas. 717, 733, where the meaning of "in port" was also considered).

The creation of fiscal ports has always remained part of the Royal prerogative, and their boundaries have been fixed by Royal Commission; thus in 1684 a Royal Commission set out the limits of the *regiæ cameræ* (King's chambers) *et portus regii* (Moore, 813, 814). This power is now exercised by the Treasury, which has power to appoint ports for the lading or unlading of goods and their limits, and similarly with quays, warehousing ports, sufferance wharves, and landing and boarding stations (1876, 39 & 40 Vict. c. 36, ss. 11-16); and any such ports are ports within the meaning of the Act of 1814, 54 & 55 Geo. III. c. 159, s. 14, from which no ballast or shingle may be taken unless with the leave of the Board of Trade (see *Nicholson v. Williams*, 1871, L. R. 6 Q. B. 632).

A place may have a port for pilotage purposes, *i.e.* the area within which its pilotage authority has jurisdiction, which extends beyond the limits of its port authority; *e.g.* for pilotage purposes the port of

Liverpool begins at Point Lynas (*Sailing Ship Garston Co. v. Hickie*, above); and the port of Bristol extends to the westernmost part of the Flat and Steep Holms in the Bristol Channel (*The Charlton*, 1895, 8 Asp. 29).

For business purposes, *i.e.* in commercial contracts, the limits of a port are determined neither by its fiscal, municipal, nor pilotage limits, but by the usage of the mercantile community there.

A port in this sense is a place of safety for the ship and goods, while the goods are being loaded or unloaded. . . . This may be a natural port, that is, a place in which the conformation of the land with regard to the sea is such that if you get your ship within certain limits, she is in a place of safety for loading and unloading. That is almost certain to be the port in a business sense, . . . a place where there is protected water by reason of the natural lie of the land and water. It may be an artificial port, made by breakwaters and walls. . . . It may be only a place of comparative safety, where neither the natural configuration of the land with regard to the sea nor the artificial walls make a perfectly safe port, . . . and it is then necessary to find out where, in fact, people have their ships loaded and unloaded; for, as a general rule, people do not load or unload outside a port. Though the loading and unloading of goods is not always the exact measure of a port, it is a safe rule to say that the loading or unloading takes place within the port. If you want to find out how far the port extends beyond the place of loading and unloading, the next test to apply is in what space of water the port authorities exercise authority over ships, and the shipowners and shippers who have ships therein submit to the jurisdiction of the authorities (*Brett, M.R., Sailing Ship Garston Co. v. Hickie, ante*, pp. 588-590; and see *per* Lord Halsbury, *Hunter v. Northern M. I. Co., ante*, 722; and Lord Herschell, *ibid.*, 726).

It may be an open and exposed roadstead (*Sea I. Co. v. Gavin*, 1830, 2 Dow. & C. 129; and see FINAL SAILING). Under a policy on goods "at and from Lyme to London," goods loaded at Bridport, which is within the legal port of Lyme, and eight miles nearer than it to London, were held not to be covered (*Constable v. Noble*, 1810, 2 Taun. 403; 11 R. R. 617); and goods insured "at and from Carmarthen to London" not to include goods landed at Llanelly, in the legal port of Carmarthen, but having a custom-house of its own (*Payne v. Hutchinson*, 1808, *ibid.* 406; 11 R. R. 620). A policy on goods "at and from a port of lading in North America to London" was held not to cover goods loaded at two ports in New Brunswick lying within seven miles of each other, and in the same arm of the sea (*Brown v. Tayleur*, 1835, 4 Ad. & Ec. 241). Under a warranty "free from capture in port or ports," a ship at anchor off Ghoree, in the river Maas, within the headlands which form the mouth of the river, and captured, is a loss under the policy (*Baring v. Vaux*, 1810, 2 Camp. 541; 11 R. R. 791). Under a warranty "free from capture or seizure in port of discharge," the words "port of discharge" have been held to mean any place where the ship has come to anchor within danger of capture from the land (though the capture be made from the sea), in order to discharge cargo, whether the place be an open roadstead outside a harbour where ships usually unload, or a river, the estuary of a port where the ship is waiting for intelligence; and the underwriters are exempt in such a case (*Dalgleish v. Brooke*, 1812, 15 East, 295; 13 R. R. 476; *Oom v. Taylor*, 1812, 3 Camp. 204; *Maydew v. Scott, ibid.* 205; *Jarman v. Coape*, 1811, 13 East, 394;

12 R. R. 374). But if the purpose of the ship's presence at the particular place where the capture takes place is not to unload, and she is at anchor in the open sea outside the roadstead, the underwriters are liable (*Mellish v. Staniforth*, 1811, 3 Taun. 499; *Levy v. Vaughan*, 1812, 4 *ibid.* 387; 13 R. R. 643; *Keyser v. Scott*, *ibid.* 660; 13 R. R. 721; *Levin v. Newnham*, *ibid.* 722; 14 R. R. 648). Under a warranty "free from confiscation by Government in ship's port of discharge," a ship in Pillau Roads, seized by Prussians and Frenchmen, and condemned as prize at Paris, was held not covered by the warranty (*Levi v. Allnutt*, 1812, 15 East, 267). In a marine policy on a ship "at a port or place" in a particular country, a "place" means a place where the ship arrives for some purpose, *e.g.* loading, etc., and not where she is merely passing (*Mar. Ins. Co. v. Alianza I. C. of Santander*, 1907, 13 C. C. 46). For the meaning of "in port" or "out of port" by a particular day, see FINAL SAILING; MARINE INSURANCE; and for what is a "safe port," see ALWAYS AFLOAT.

The law relating to the management of ports has already been treated under HARBOURS; but dockyard ports are specially provided for, and require separate notice.

PORT (DOCKYARD).

The former powers of the Admiralty for the protection of navigation (given in detail under HARBOURS) were transferred to the Board of Trade in 1862 (25 & 26 Vict. c. 69); but where it appears to the Admiralty that the interests of His Majesty's naval service require that the whole or any part of any harbour, port, bay, estuary, or navigable river, in, on, or adjoining to which there is or shall be any of His Majesty's dockyards, victualling yards, steam factory yards, arsenals, or naval stations, should be excepted out of that transfer, the Admiralty may give notice in writing to that effect to the Board of Trade, and the port, or part of it, remains under the control of the Admiralty (s. 9). Superintendents of His Majesty's dockyards are in all places justices of the peace in respect of offences specified in the Admiralty Powers Act, 1865, and of all matters relating to His Majesty's naval service, and its stores, provisions, and accounts (28 & 29 Vict. c. 124, s. 5). Royal dockyards and naval military establishments are exempted, so far as watching, lighting, paving, and internal regulations, from the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 254. Wilful firing of His Majesty's ships or stores in any dockyard is punishable by death (1772, 12 Geo. III. c. 24); and the same penalty is inflicted by the articles of war on persons subject to them for setting fire to any dockyard, ship, etc., not being property of an enemy, rebel, or pirate (1866, 29 & 30 Vict. c. 109, s. 34). Wilful firing, or attempting to fire, any building belonging to any port, dock, harbour, etc., is a felony punishable by penal servitude (1861, 24 & 25 Vict. c. 97, ss. 4-8).

The following special provisions for dockyard ports are made by the Regulation of Dockyard Ports Act, 1865, 28 & 29 Vict. c. 125:—The limits of a dockyard port for the purposes of the Act may be defined by Order in Council (s. 3). A King's harbourmaster may be appointed by the Admiralty to superintend the execution of the Act, and protect the port (s. 4). Port regulations may be made by Order in Council for prohibiting the mooring or anchoring of vessels so as to obstruct the navigation of the port; appropriating a mooring place or anchorage

ground for the exclusive use of His Majesty's ships, but the user of such space must not obstruct the navigation of the port; prohibiting the having of gunpowder, or having or firing shotted or loaded guns on board any ship in any specified part of the port, and regulating loading or unloading of gunpowder; restricting the use of fire and light, and the having of tar, oil, or other combustibles in a ship in a specified part of the port; prohibiting steam vessels being navigated at a more than specified speed in any specified part of the port; requiring one person at least at all hours of the day and night in every vessel above a specified size placed in any specified part of the port; prohibiting and regulating the breaming of vessels in any specified part of the port; and for other purposes required for the proper protection of His Majesty's ships, dockyards, or property, or the requirements of the naval service (s. 5). Penalties may be imposed by Order in Council for offences against such regulations not exceeding £10 (s. 6). Rules may be made by Order in Council on the joint recommendation of the Admiralty and the Board of Trade, as to the lights or signals to be carried or used, or steps to be taken for avoiding collisions by His Majesty's and other vessels navigating the port and its approaches, which have the same effect as the statutory regulations (s. 7; see COLLISIONS AT SEA). Copies of such rules are to be sold by the Admiralty, and published in the *London Gazette*, and bind all persons (ss. 8, 9, 10). The King's harbourmaster may moor, anchor, place, unmoor, or remove any vessel not moored, etc., by her master according to directions given by the harbourmaster, or left with no one on board her (s. 11); he, or anyone so authorised in writing by the Admiralty, may search any vessel in a dockyard port for gunpowder, loaded guns, fire, light, and combustibles being, or being suspected to be, on board, and may put out such fire or light, and any person obstructing him in the execution of this authority is liable to a fine of £10 (s. 12); he may also remove any wreck or thing obstructing a dockyard port or its approaches, and any floating timber impeding its navigation (s. 13); he may also remove any vessel laid by or neglected as unfit for sea service in any part of a port specified as above, and lay her ashore where this can be done without injury (s. 14). The expenses of removing such wreck or thing or timber or vessel are repayable by its owner; and on failure to pay such expenses, the harbourmaster may sell the wreck, etc., and after repaying the expenses, restore the surplus to the owner, and any deficiency may be recovered from the owner (s. 15). The owner of any vessel or thing compelled to pay any penalty, expenses, sum of money, or costs owing to any act or omission of the master of a vessel, or any other person, may recover it with costs from the person by whose fault such payment had to be made (s. 16). Such penalties, expenses, etc., may be recovered summarily (s. 17); and when recovered, except in the case of a sum recovered by a shipowner from a master or other person, go to the Consolidated Fund (s. 18). Such penalties and expenses and sums of money may be raised, if the master or owner of a ship fail to pay it, by distress or sale of the vessel, her tackle, furniture, and apparel (s. 19). A summons under this Act may be served by being left on board the vessel for the person intended to be served with the person apparently in charge of the ship (s. 20). For the purpose of jurisdiction every offence against this Act, or any Order in Council made under it, is deemed to arise either in the place where it was committed or where the offender happens to be (s. 21). The jurisdiction of any justice, sheriff, or magistrate abutting on the shore of the

sea, or other navigable water, extends over any vessel near the shore, and every person on board her (s. 22). Nothing in the Act is to prejudice or abridge the rights of any conservancy authority over any part of a dockyard port or its shores and banks (s. 23). Every Order in Council made under this Act must be laid before both Houses within thirty days of its being made, if Parliament be sitting, or otherwise thirty days after Parliament next meets (s. 26).-

[*Authorities.*—Moore, *Foreshore*, 1888; Abbott, *Shipping*, 14th ed., 1901; Arnould, *Marine Insurance*, 7th ed., 1901.]

Port Charges.—Where a charter-party provided that if, in consequence of breakdown of machinery, the ship put into a port other than her destination, "port charges and other expenses" were to be borne by the shipowners, it was held that the price of coal supplied at a port of refuge was not included in these words (*The Durham City*, 1889, 14 P. D. 85); but "port charges" in a charter-party have been held to include light dues (*Newman v. Lamport*, 1895, 1 Com. Cas. 161); and tonnage dues (*Rowlands v. Wills*, 1898, 14 T. L. R. 183). In an action to recover port tolls the fact that the whole of the amount borrowed for the purpose of providing the buoys, etc., for the harbour was not expended is no defence (*Queenborough Corporation v. Smeed*, 1904, 20 T. L. R. 279).

Porters.—The Company of Porters was the means whereby the Corporation of London exercised its ancient right of measuring all corn, onions, salt, grain, and fruit, and all merchandise, measurable and mete to be measured, brought to the City of London. See **METAGE DUES**.

The Company was regulated by orders made by the Court of Common Council, and dissolved by an Act of the Council in 1894.

(See Acts of Court of Common Council, October 5, 1620, and May 16, 1681; Midd. and Herts N. & Q., vol. i.)

Portgreeve; Portreeve.—Portgerefa, a royal officer who acted as the King's bailiff in trading towns and mercantile places. He was probably elected, though the assent of the King was necessary. His duties were partly judicial, but chiefly consisted in the collection of tolls, customs, and other royal dues before they were let to fee-farm. In the smaller towns it seems also to have been his duty to witness all transactions by bargain and sale. In the charter granted by William I. to London, "William the King greets William the bishop and Gosfrith, the portreeve, and all the burghers within London, French and English, friendly." From the position assigned to the portreeve in this writ, which answers to that given to the sheriffs in ordinary writs, Stubbs says it may be inferred that he was a royal officer who stood to the merchants of the city in the relation in which the bishop stood to the clergy (Stubbs, *Const. Hist.*, vol. i. p. 439). The word is derived from Latin *porta* (not *portus*, a haven) and A.-S. *gerefa*, which is in turn derived from A.-S. *rof*, active, excellent, famous, and is not to be connected with German *graf* (Skeat, *Etymol. Dict.*). The system of gerefas pervades the whole Anglo-Saxon system. "Greve autem nomen est potestatis; apud nos autem nihil melius videtur esse quam præfectura" (Laws of Edward the Confessor, c. xxxii.). We hear of scir-gerefa, burhgerefa, portgerefa, wicgerefa, and others; *Est enim multiplex nomen*.

When the burgesses began to incorporate themselves to guarantee the King the payment of his dues, and received *firma burgi*, the title gradually disappeared, and that of mayor supplanted it; but it survives in a few places even to this day, notably in Derbyshire, in which county at least ten towns, including Tavistock, Holsworthy, and Crediton, have a portreeve for their presiding officer.

[*Authorities*.—Kemble, *Saxons in England*; Stubbs, *Constitutional History of England*, 1883; Gneist, *History of the English Constitution*.]

Port Helm.—See COLLISIONS AT SEA.

Portioner.—A minister who serves a benefice alternately with others, receiving, accordingly, only a proportion of the tithes and profits.

Portions.—The rule as to portions was stated by Lord Eldon in the leading case of *Ex parte Pye*, 1811, 18 Ves. 140; 11 R. R. 173, that where a parent, or person *in loco parentis*, gives a legacy to a child, not stating the purpose with reference to which he gives it, equity presumes him to give a portion (see the case in White and Tudor's *Leading Cases in Equity*, pp. 366 *et seq.*): "And by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part."

The "doctrine against double portions" above described has been frequently adversely criticised for the hardship it produces. Its application leads not only to SATISFACTION (strictly so called), where a portion is covenanted for, of the portion by a legacy, but also to the ademption of a legacy in the case where, having provided for a child by his will, the father subsequently makes some provision for that child *inter vivos*.

The extent of and reason of the doctrine may be thus stated: "As between father and son the presumption arises that a father does not intend to give double portions to his children; that is to say, if a father has made a provision by way of covenant in favour of his child before the date of his will, then unless it appears upon the will or by parol testimony (which in such cases is admitted in rather an anomalous way in order to rebut the presumption) that he intends to give the benefit conferred by will in addition to that which is already secured to the child by covenant, the child will not take both. In other words, the benefit given by will is presumed to be given on an implied condition that if the son takes it he must give up and surrender that which has been already secured to him by covenant. The same presumption arises, in another form, where the father by his will gives a benefit to a son, and afterwards on his marriage, or upon some other event, makes a settlement upon him; and there again the later provision is considered as an ademption of the previous gift, by will, unless it can be seen, either by parol testimony as to the intention of the father, or by something appearing upon the documents, that the son is intended to have both" (*Montague v. Earl of Sandwich*, 1886, 32 Ch. D. 525).

Satisfaction and ademption are doctrines embracing other cases

besides those of double portions, and for a fuller discussion of the subject the reader should refer to the titles ADEMPMENT; ELECTION; SATISFACTION; it is beyond the province of the present article to deal with any other doctrine than that of the leaning of Courts of equity against double portions.

Before proceeding further, it should be mentioned that it was formerly considered that for a portion to go in ademption of a legacy it must be something that must satisfy the legacy altogether, and not *pro tanto*. The doctrine that a legacy may be adeemed *pro tanto* by a portion was established by *Pym v. Lockyer*, 1839, 5 Myl. & Cr. 29; 41 E. R. 283; 48 R. R. 219; and is of importance in connection with the question of what gifts may be regarded as portions.

In deciding whether a case comes within the rule against double portions, it is from the circumstances much easier to assume an intention to adeem a legacy by a portion than an intention to satisfy a portion by a legacy; and it is the intention of the testator that must in each case be looked at. In the former the will comes first, and is revocable at the testator's option; in the latter there is a binding obligation, which, to be got rid of, must be discharged.

Again, in determining whether the rule applies, the primary question is, What is a portion? It is clear that every sum, no matter how small, cannot reasonably be deemed to be a portion in respect of which the recipient is, under the rule, to account. [A small thing is a gift (*Ravenscroft v. Jones*, 1864, 4 De G., J. & S. 224; 46 E. R. 904).] Accordingly, the sufficiency of the gift and also its purpose must be considered: in the first place, it should be something given by a parent to establish a child in life, to make a provision for him in the ordinary sense of the term, not a mere casual payment for maintenance (*Taylor v. Taylor*, 1875, L. R. 20 Eq. 155). Such provision may be a marriage portion, money to start in business or a profession. "Any sum given by way of making a permanent provision for the child would come within the term 'establishing in life'" (*s.c.*). [It does not follow that sums expended by a father in payment of a son's debts are regarded as portions or advancements (*Re Scott*, [1903] 1 Ch. 1).] The gift need not, however, be cash, *e.g.* a commission and an outfit on entering the army come within the definition, though payment of passage money does not. A bequest of a business and of a share of residue are portions (*Vickers v. Vickers*, 1888, 37 Ch. D. 525). And where a testator by his will bequeathed his residue (including a business directed to be sold) for the benefit of his children, and, after making his will, assigned his business to his two sons, the sons' shares in the residue were held to be adeemed, owing to the presumption against double portions, to the extent of the value of the business assigned on trust, and such value had to be brought into account in the distribution of the residue. (Other cases of bequests of businesses are *In re Lawes*, 1882, 20 Ch. D. 81, and *In re Lacon*, *Lacon v. Lacon*, [1891] 2 Ch. 482.) Generally, it may be stated that the reason of the rule against double portions being to give all children equal shares, it applies to gifts of all kinds of property, so long as they are sufficient and may reasonably be supposed to be meant as a provision. But of course the nature of the benefit must be taken into account. [An annual sum paid by a father for maintenance of his daughters was held not to be an advancement to them (*Hatfield v. Minct*, 1878, 8 Ch. D. 136)]; and, for example, nobody would imagine that a father "leaving a diamond necklace to a daughter would mean that to be a portion" (*Tussaud v.*

Tussaud, 1878, 9 Ch. D. 363, 367). A portion is not, however, restricted to a gift of money or money's worth; it is anything which a person *in loco parentis* allots as a provision in discharge of his obligation, and includes realty as well as personalty (cp. *Taylor v. Taylor*, 1875, L. R. 20 Eq. 155; *Pym v. Lockyer*, *loc. cit.*; *Thynne v. Earl of Glengall*, 1867, 2 H. L. 131; *Russel v. St. Aubyn*, 1876, 2 Ch. D. 398; and see *post*). [It may consist of a perpetual annuity to be paid to beneficiaries under a son's marriage settlement (*Dawson v. Dawson*, 1867, L. R. 4 Eq. 504).]

Besides the nature and sufficiency of the gift, the limitation of it has sometimes to be considered in the case of gifts to daughters. The cases are summarised in *Tussaud v. Tussaud*, *supra*. They come to this: "That wherever there is a sufficient sum which can reasonably be presumed to be a provision, and wherever it is so settled by the will in the ordinary way, the Courts of equity have said that is a daughter's portion within the rule [against double portions] to the extent of the whole fund." "Settled in the ordinary way" includes not only a settlement to a daughter for life, with power of appointment by will or with remainder to her children, but also where the settlement is to the daughter for life, then the husband for life, and then the children; and the interest of the husband need not be deducted in estimating the portion (*Weall v. Rice*, 1831, 2 Russ. & My. 251; 39 E. R. 390; 34 R. R. 83).

The rule against double portions is a presumption of law, and is as such rebuttable by evidence of intention. Such evidence may be intrinsic or extrinsic, and parol evidence to rebut the presumption is admissible, both as regards deeds and wills. The chief instances of intrinsic evidence that rebuts the presumption are—

1. Substantial differences between the two provisions. "Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature, and every judge must decide that question for himself" (*Lord Chichester v. Coventry*, 1867, L. R. 2 H. L. 71, approving *Weall v. Rice*, *ubi supra*). The question is, are the parties to be benefited and the nature of the benefit substantially different, *e.g.* where a father covenanted with the trustees of his daughter's marriage settlement that his executors should pay, six months after his death, £2000 consols to the marriage-settlement trustees, and subsequently made his will, bequeathing money to trustees upon trust to the daughter for life for her separate use, with remainder to her children, and the settlement contained various trusts in favour of the husband and appointees of the daughter, it was held by the Court of Appeal, in *Tussaud v. Tussaud*, *ubi supra*, that there were such substantial differences between the provisions made by the settlement and by the will as to rebut the presumption against double portions.

2. A difference in the subject-matter of the gift is in itself insufficient to rebut the presumption of satisfaction or ademption. Shares of residue and bequests of businesses, or taking a son into partnership, have been all held to be in satisfaction of obligations to the beneficiaries entirely distinct from the gift itself. The case of *Bengough v. Walker*, 1808, 15 Ves. 507; 33 E. R. 847; 10 R. R. 106—share of a business in satisfaction—has been followed in the cases of *Lawes v. Lawes* and *In re Vickers*, *ubi supra*. And although in the former case the decision was given without touching upon the question "whether, having regard to recent decisions, a pecuniary portion can be satisfied by a gift

not of money but of money's worth" (20 Ch. D., at p. 86), inasmuch as the capital in the business with which the son was credited exceeded the amount of the obligation to the son, and in some of the earlier cases the putting of a monetary value on the property by the father, or person *in loco parentis*, is spoken of as a requisite for the presumption of satisfaction to arise, we apprehend that this distinction is not now recognised, at all events where "there does not seem such a want of harmony in the subject-matter of the gift in the will and the subject of the gift in the deed, or such incongruity between the two things as to create a difficulty in saying that the one cannot be taken in satisfaction for the other" (North, J., in *Vickers v. Vickers*, 1888, 37 Ch. D., at p. 532, a case wherein there was admittedly a handing over of the whole business, whatever its value, and not one where the donor could be said to have ascertained or estimated the value of the gift). And in *In re Lacon*, *loc. cit.*, Romer, J., said:—

"But then it is said that admitting this to be a gift, yet, to come within the law regarding the ademption and satisfaction of portions, a gift must be of money or of some property, the monetary value of which had been pointed out or fixed by the donor. In my judgment this contention cannot be supported. I know of no principle on which a distinction can be drawn, for the purpose of considering what is a portion, between a gift of money and a gift of any other kind of property, and I know of no authority supporting the contention. On the contrary, the cases show that gifts of shares of residue, of shares in partnership property, and of real estate, have been considered and treated as portions."

But a portion necessarily implying a bounty, if the element of consideration can be shown to exist in either of the transactions the doctrine of double portions has no application. And in *Lacon v. Lacon*, *loc. cit.*, it was for this reason that the doctrine was held not to apply, the son in this case claiming to be a purchaser for value of the shares which had been given him in the business of his father. The son having for many years managed the business, the father, on his asking for an increase of salary, gave him two shares in the business, and the Court held that, assuming the two shares which the son received in the testator's lifetime were given him by way of portion, the presumption against double portions was rebutted by the circumstances under which he received them, which showed that the testator intended him to have a greater share in the business than his brothers.

But, *semble*, the two shares were not intended as a portion, but as remuneration for his services as manager, and the rule against double portions would not be applicable even primarily.

The authorities are not clear as to who is a person *in loco parentis*. In the cases referred to above the person in question has been the father. The subject has been considered in the case of *In re Ashton*, *Ingram v. Papillon*, [1897] 2 Ch. 574; [1898] 1 Ch. 141, where Stirling, J., adopted Lord Eldon's definition in *Ex parte Pye*, *loc. cit.*:—

"A person meaning to put himself *in loco parentis*—in the situation of the person described as the lawful father of the child. But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would

be most illogical, from the mere exercise of any such office or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child."

And the question as to who is *in loco parentis*, where the person concerned is other than a father, being one of intention, the index to, though not conclusive proof of, such an intention, is the manner in which that person has acted, *e.g.* if the person's conduct is such as to raise a moral obligation to provide for the donee, the presumption would be that he is *in loco parentis*; if, on the other hand, the child lives with its father and is maintained by him, the inference against any other person being *in loco parentis* is very strong. Accordingly, where a donee of a special power to appoint amongst her children, grandchildren, and other issue, in exercise of that power by her will directed the trustees to divide the fund equally among her three children, and subsequently by deed irrevocably appointed one-third to one of her children, it was held that the rule against double portions did not apply, and that the child to whom the appointment was made by deed might share equally with the other two under the will. After referring to Lord Eldon's definition, and remarking on the transition therein from the word "parent" to the word "father" without making any distinction between the two terms, Stirling, J., thus gives the reason of his decision:—

"*Primâ facie* the duty of making a provision for a child falls on the father, but may fall on or be assumed by some other person. I do not say that in no case and under no circumstances can the duty fall on or be assumed by the mother of the child; but it appears to me that the burden of proving such to be the case lies on those who assert the fact so to be. In the present case the mother was distributing a fund derived under the will of her own father; and there is no evidence that either she or her father undertook the discharge of any such duty. In my judgment, the rule under the circumstances does not apply" (*In re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574, 578).

This decision was reversed but solely on the evidence by the Court of Appeal, it appearing that the child in question had, as a fact, accepted the appointment by deed in prepayment or anticipation of her third share under the will; but the question of law dealt with by Stirling, J., as to the application of the rule against double portions, was not discussed, the case being treated as equivalent to that of a legacy given by will of a sum of money and of payment by the testator in his lifetime to the legatee in anticipation (S. C., [1898] 1 Ch. 143).

There is no obligation according to the rules of equity on a mother to provide for her child, hence in ordinary circumstances no presumption against double portions (*Bennet v. Bennet*, 1879, 8 Ch. D. 474; *Re Ashton, ubi supra*).

The presumption against double portions may be rebutted by evidence of intention and statements of the testator are admissible (*Fowkes v. Pascoe*, 1875, L. R. 10 Ch. 343; *Re Scott*, [1903] 1 Ch. 1). And further parol evidence is admissible to show that a testator did in fact put himself in the position of a parent (*Powys v. Mansfield*, 1836, 3 My. & Cr. 359, 370; 40 E. R. 964; 45 R. R. 277).

Portmen are the burgesses of Ipswich and the Cinque Ports; and a *portmote* is a Court held in haven towns or ports, and sometimes in inland counties (Lely, *Dictionary*).

Portrait.—A portrait is generally defined to be the painting, drawing, or engraving of the likeness of a person, or even sometimes of an animal, in a vivid or graphic manner. The word comes through the French from the Latin *pertrahere* or *pertractare*, and therefore implies some degree of completeness or perfection or similitude to life, which quality will distinguish a portrait from a mere sketch or caricature. So the terms “portrait bust” or “portrait statue” are used as distinguished from “ideal bust” or “ideal statue.” The usual form of portrait represents a person’s head and shoulders, but the term equally applies to greater lengths and to figures with accessories, provided the figures are the main subjects. Sir Joshua Reynolds says: “In portraits the grace, and we may add the likeness, consists more in the general air than in the exact similitude of every feature.” A photographic likeness, therefore, though sometimes spoken of as a portrait, is not, properly speaking, such. History pieces, too, such as battle scenes, though containing likenesses of real persons, are not portraits, because the likenesses are not the main object of the picture. A painting of a figure on horseback, however, which forms its main feature, even though several other objects also appear thereon, is a portrait (*Duke of Leeds v. Earl Amherst*, 1844, 14 L. J. Ch. 73).

Portraits will, as a rule, come within the protection afforded to paintings, drawings, and the designs thereof, and photographs under the Copyright (Works of Art) Act, 1862, 25 & 26 Vict. c. 68. So the reproduction of a crayon drawing made from part of a photograph of the Princess of Wales was held to be an infringement of the copyright in the photograph (*London Stereoscopic Co. v. Kelly*, 1888, 5 T. L. R. 169); and where *The Sketch* published a reproduction of a drawing made on a larger scale from the photograph of a tiger, it was held also to be a breach of copyright (*Bolton v. Aldin*, 1895, 65 L. J. Q. B. 120). But if there is sufficient variation no breach will be committed, as if sketches are made of *tableaux vivants* representing well-known paintings, where, at all events, the faces, etc., must be different (*Hanfstaengl v. Baines & Co.*, [1895] A. C. 20). See, further, COPYRIGHT.

Portsale.—Auctions, or public sales of goods to the highest bidder, taking place in ports, were formerly so called. The term seems particularly applicable to sales of fish “on the stone,” as soon as brought into harbour (*cp.* 25 Hen. VIII. 1533, c. 4, repealed by 35 Hen. VIII. 1543, c. 7).

Port Sanitary Authority.—This is a body intrusted with the duty of providing for the public health of a port; and its constitution, duties, and liabilities are regulated by the Public Health Act of 1875, and the Public Health (Ports) Acts, 1896.

The Local Government Board may by provisional order permanently constitute any local authority whose district, or any part thereof, forms part of or abuts on any part of a port in England or the waters of such port, or any conservators, commissioners, or other persons having authority there (referred to in the Act as a riparian authority), the sanitary authority of the whole or part of such port (referred to in the Act as a port sanitary authority). The Board may also similarly permanently constitute a port sanitary authority for the whole or any part of a port by combining any two or more riparian authorities having jurisdiction in such port (and prescribe the mode of their joint action), or by forming a joint board, consisting of representative members of any

two or more riparian authorities, in the same way as the Act provides for the formation of a united district. It may also similarly permanently constitute a port sanitary authority by forming a joint board, consisting of representative members of all or any of the riparian authorities having jurisdiction in such ports or part thereof. In any case, where the Board can do this, it can, till such order has been confirmed by Parliament, temporarily constitute by order any such authority, and from time to time renew such order, and by any order so made or renewed make any provisions that it can under this section make by provisional order. Any order constituting such an authority may assign to it any powers, rights, duties, capacities, liabilities, and obligations, and direct how its expenses are to be paid; where such order constitutes a joint board such an authority, it may contain regulations with respect to any matters for which regulations may be made by provisional order forming a united district under this Act.

A port in this Act means a port as established for customs purposes (s. 287).

The order of the Board constituting such an authority gives it jurisdiction over all waters within the limits of the port, and also over the whole or a specified part of the district in the jurisdiction of any riparian authority (s. 288). Such an authority may, with the sanction of the Board, delegate the exercise of its powers to any riparian authority in or bordering on their district, but only to the extent of that order (s. 289). Any expenses which a port sanitary authority temporarily constituted incurs in carrying into effect the purposes of the Act are defrayed out of a common fund contributed by riparian authorities in proportions decided on by the Board. If it is a local authority, such an authority may raise its proportion of expenses in the same way as it can raise funds for expenses incurred by it in any way for the purposes of the Act. To obtain payment from contributing riparian authorities, the port sanitary authority issues precepts to them; any contribution payable by a riparian authority is a debt due from it, and may be recovered accordingly, and such contributions in the case of a rural authority are deemed general expenses of that authority. In case of default, the port sanitary authority may, instead of or in addition to proceeding for recovering the debt, proceed summarily under the Act to raise in the district of the defaulting authority a sum sufficient to pay the debt. Where several riparian authorities are combined in the district of one port sanitary authority, the Board may, by order, exempt one or more of them from contributing to their own expenses (s. 290).

Where a port sanitary authority is authorised to proceed summarily to raise the amount of a debt in the district of a defaulting authority, it has all the powers which that authority would have in respect of expenses properly incurred by it, such as levying the money by rate by its officers or by precept; such precept may be for an amount exceeding the debt (but not by more than 10 per cent.), so as to include the expenses of collection, and any balance over is rendered to the defaulting authority (s. 292). Existing port sanitary authorities and their establishments are continued by the Act, and are subject to it, with a saving of their previous rights (s. 326). Port sanitary authorities may borrow on the credit of any fund or rate applicable by them to the purposes of the Act, or on the credit of their sewage land or plant; and the Public Loans Commissioners may make them loans on the terms requisite in the case of local authorities (s. 244).

By an amending Act, the Public Health (Ships, etc.) Act, 1885, 48 & 49 Vict. c. 35, it is provided that the Local Government Board may permanently constitute such authorities by order in cases where they could do so by provisional order. Every such order comes into operation on a day fixed thereby, unless it is objected to by a riparian authority, who would thereby contribute to the expenses of the new authority, within a specified time, in which case it becomes a provisional order, and does not take effect till confirmed by Parliament; and the Board may repeal, alter, or amend, by subsequent order, any such order not so made provisional (s. 3). The Act (by sec. 2) extends sec. 110 of the Public Health Act, 1875, so as to have effect not only as to nuisances but also as to the provisions relating to infectious diseases and hospitals referred to in the schedule of the 1875 Act.

In addition to the powers mentioned in sec. 287 of the Act of 1875, the Local Government Board may, under the Public Health (Ports) Act, 1896, by order assign to a port sanitary authority any powers, etc., under the Infectious Diseases Prevention Act, 1890, 59 & 60 Vict. c. 20, s. 1, with necessary modifications.

An island within the district of a port sanitary authority and also within that of a rural district council must contribute to the general expenses of the rural district, notwithstanding that sanitary powers are exercised by the officers of the port sanitary authority (*Clark v. Rochford R. D. Council*, 1897, 13 T. L. R. 371).

As to the meaning of the words "within the limits of the said port," see *Assheton Smith v. Owen*, [1905] 1 Ch. 179.

The port sanitary authority for the port of London is the corporation, which pays its expenses out of its corporate funds, and is given all the powers of such an authority by the Board (1891, 54 & 55 Vict. c. 76, ss. 111, 112); and among its duties is seeing that engines and furnaces in steam vessels in the Thames, above London Bridge, or plying between that bridge and any place west of the Nore Light, consume their own smoke, and failure to comply with this regulation entails a penalty on the owner or master of the vessel (s. 23).

The annual reports of the Local Government Board contain a list of the port sanitary authorities permanently constituted whether by order of the Board or by provisional order confirmed by Parliament. Lists (but not the text) of the orders issued during any year giving the dates and registered numbers will be found in the yearly volumes of the St. R. & O.

[*Authority*.—Glen, *Public Health*.]

Portugal.—*Area*.—The Kingdom of Portugal occupies the strip of coast on the west of SPAIN (*q.v.*). Continental Portugal, comprising the Azores and Madeira, has an area of 35,490 square miles, or about one-third the size of the United Kingdom. Portugal's colonial possessions, in Africa and Asia, are referred to below. Her African dependencies are very extensive, having an area of 793,980 square miles, or nearly one hundred times that of the Asiatic ones.

Earlier History.—The history of Portugal really begins with the gift of the Terra Portucalensis, or the county of Porto Cale, which was made up of the fiefs of Coimbra and Oporto, to Count Henry of Burgundy by Alphonso VI., King of Leon, Castile, and Galicia in 1094. Prior to that year its history is that of the rest of the Iberian Peninsula

(see SPAIN). It was not till 1143 that the county of Portugal obtained its independence from Galicia and became a kingdom under Affonso Henriques, the son of Count Henry. The next two centuries were taken up with constant wars against the Mohammedans in the south of the peninsula, and was the period in which Portugal obtained her present continental proportions. In 1415 the Portuguese invaded Africa, and by the capture of Ceuta made their first conquest beyond the limits of their country. This century is famous in the annals of Portuguese history owing to the encouragement given to maritime exploration, first of all by Prince Henry the Navigator, and on his death, in 1460, by King John II. of Portugal and his successors. The Cape of Good Hope was rounded by Diaz, expeditions were sent to Timbuctoo and Nova Zembla, the East was opened up by Vasco de Gama, and Cabral discovered Brazil. In this work of exploring, conquering, and colonising distant parts of the world other nations soon followed, but to Portugal is due the honour of being the first nation to show the way. During the first three-quarters of the sixteenth century the Portuguese had hardly any European rivals in Asia at all and possessed large Eastern possessions.

Decay of Portuguese Power.—In 1580 Portugal came under the sway of SPAIN (*q.v.*), and during the sixty years of Spanish domination, from 1580 to 1640, disasters befell Portugal, for the Dutch, English and French, all seized upon its great colonial possessions, the Dutch in particular defeating the Portuguese in India and depriving them of the greater part of their lucrative Indian trade. Portugal was never able to recover from the deadly blows struck at her colonial possessions. In 1640 the Portuguese rose and expelled the Spaniards and recovered their independence. In the eighteenth century France and Spain invaded Portugal, but were expelled with the aid of the English. The Portuguese settlement in URUGUAY (*q.v.*), which had been Portuguese since the end of the sixteenth century, was wrested from them by the Spanish in 1777. At the commencement of the nineteenth century the French for a time during the Peninsular War obtained the mastery in Portugal, and in 1807 the Regent, Dom John, retired to Brazil, which now became the head of its own mother country; but the Government was not in the hands of the Brazilians, but in the Portuguese followers of Dom John. The Anglo-Portuguese occupation of the Peninsula during the contest with Napoleon called for exceptional legislation. An Act of 1813 (53 Geo. III. c. 150), provided for the appointment of an Auditor-General of Accounts of Public Expenditure in Spain and Portugal. This Act was extended to France by 54 Geo. III. c. 98, and is an exceptional instance of the establishment by British Statute of an administrative department in a foreign State. These arrangements terminated in 1821 (see 1 & 2 Geo. IV. c. 121, s. 16).

In 1815 the Portuguese sovereignty took the title of the United Kingdom of Portugal, Brazil, and Algarves, the old colonial Government of Brazil thus disappearing even in name. In 1817 Brazil took possession of Montevideo, and Uruguay was forcibly turned into a Brazilian province, and remained so until it secured its independence in 1825. Owing to the exclusive administration of affairs being in Portuguese hands, the Brazilians became discontented and determined to become independent of Portugal, and in 1822 Brazil became an independent empire with a free constitution under Dom Pedro, Dom John's son.

Recent Changes.—Quite recently Portuguese affairs have attracted much attention. The constitutional attempts to introduce reforms in the Constitution and do away with some of its most corrupt features were far from successful. Accordingly at the end of 1907 a practical dictatorship was established with the royal approval under Senhor Joao Franco, Parliament did not sit, laws were issued in the shape of decrees, municipal elections did not take place, and the press was subjected to so strict a censorship that early in 1908 virtually all the newspapers were suppressed. The Republicans seeing that the dictatorship was to be a permanency determined on a general strike, and in consequence some 300 of their number were deported. The Civil List was augmented, and the pay of the entire corps of officers and all minor functionaries in the kingdom was increased, and various reforms were imposed by decree. Owing to the absence of all popular support the dictatorship was doomed, and the Republican party, gaining ground, determined to establish a Republic. On February 1, 1908, a plot to murder the whole Royal Family was partially successful, Dom Carlos and the Crown Prince being assassinated, and Dom Manuel, the younger son of Dom Carlos and the present King, being wounded whilst driving through the streets of Lisbon. Owing to the revulsion of feeling occasioned by this outrage all parties have supported the young King Manuel, who has dismissed the dictator, abrogated his measures, and reverted to constitutional methods, besides making many liberal concessions, and there is every prospect of Portuguese affairs improving in the near future.

Constitution.—The fundamental law of the kingdom is the Constitutional Charter of April 29, 1826 (Hertslet's *State Papers*, vol. xiii. p. 958), promulgated by the Emperor of Brazil, as King of Portugal, as subsequently modified [compare Constitution promulgated April 4, 1838 (*ibid.*, vol. xxvii. p. 759)]. The legislative authority is in a Parliament or Cortes Geraes, consisting of two Houses. In the Camara dos Pares, or House of Lords, under the laws of July 24, 1885, March 28, 1895, and April 3, 1896, hereditary peers are to be gradually abolished and the number of life peers—exclusive of princes of the royal blood and the twelve bishops—appointed by the King must not exceed ninety, must be over forty years of age, have received a secondary education or possess an annual income of £90, and may be selected without limitation as to class. The House of Lords deals exclusively with—(a) the trial of offences by members of the Royal Family, Secretaries of State, peers, and by deputies while the Cortes is in Session; (b) investigation into the responsibility of Secretaries of State and certain other functionaries; (c) convocation of the Cortes on the death of the Sovereign for the appointment, if necessary, of a regent. The President and Vice-President of the House are appointed by royal decree. The Camara dos Deputados, or House of Commons, under the law of August 8, 1901, consists of 155 deputies elected for three years, of whom the twenty-six electoral circles return 113, thirty-five represent minorities, and seven the colonies. The colonial deputies alone are paid, but all deputies can travel free on State railways and ships. Deputies must have an income of at least 400 milreis per annum or else be graduates of one of the highest secondary or professional schools. Peers, naturalised foreigners and certain Government employees are disqualified from being deputies. The initiative of financial measures and of bills for the recruitment of the army and navy rests solely with the Chamber of Deputies, otherwise all purely legislative functions are common to both

Houses, including the control over public finances. By the Act of April, 1896, provision was made for the settlement of disagreements between the two Houses. A committee of an equal number of peers and deputies is to be appointed as in SPAIN (*q.v.*), and in accordance with the decision of the majority of the committee, the bill in dispute shall either become law or be rejected, whereas in Spain this decision rests with the Senate and Chamber of Deputies, if they accept the committee's report. In the event of an equality of votes and if the committee can come to no agreement on the question, either of the Houses may petition the Crown for the re-assembly of the Cortes with a special mandate to deal finally with the matter. The electorate consists of all male citizens over twenty-one who can read or write, or who pay taxes up to 500 reis; workmen in Government service, non-commissioned soldiers, domestic servants, bankrupts, beggars and convicts are denied the franchise. The executive power is vested in a cabinet of seven responsible ministers under the King. There is also a Council of State or Privy Council of twelve members nominated for life who advise the Sovereign in important matters. For administrative purposes Continental Portugal is divided into seventeen districts, and there are besides three districts in the Azores and one in Madeira.

Laws.—Portugal possesses the following Codes:—A Civil Code of 1867, largely based on the model of the French Civil Code, a Code of Civil Procedure of 1876, a Military Penal Code of 1875, a Penal Code of 1886, a Commercial Code of 1888 [see *Colonial Laws and Courts* (1907), p. 34].

Courts of Justice.—Portugal is divided for judicial purposes into twenty-six comarcas, in each of which there is a Court of First Instance. There is a Supreme Court in Lisbon, and three Courts of Appeal at Lisbon, Oporto, and Ponta Delgada in the Azores respectively.

Application of Imperial Acts.—Anglo-Portuguese relations as to PATENTS (*q.v.*), trade marks and copyright in designs are regulated by Order in Council of June 26, 1884 (St. R. & O., Rev. 1904, vol. ix., "Patents, etc.," p. 5). There is no British arrangement with Portugal for the international protection of literary or artistic copyright.

EXTRADITION (*q.v.*) with Portugal is regulated by the Treaty of October 17 (*ibid.*, vol. v., "Fugitive Criminal," p. 180). Under Protocol of November 30, 1892 (*ibid.*), the treaty does not apply to extradition between British and Portuguese India.

As to ships and shipping, special provision was made by 12 & 13 Vict. c. 25, s. 2, as amended by 39 & 40 Vict. c. 20, s. 2, for the apprehension and carrying back to their ships of seamen deserting from Portuguese ships in any part of His Majesty's dominions. The existing British Regulations of 1896 for preventing collisions at sea apply to Portuguese ships, whether within British jurisdiction or not (*ibid.*, p. 285), except as regards lights on fishing boats, with regard to which Article 10 of the British Rules of 1884 apply (*ibid.*, p. 267).

Treaties with Portugal for the abolition of the slave trade were carried into effect by 5 Geo. IV. c. 113, and 6 & 7 Vict. c. 53, which, in common with other Acts, were repealed and consolidated by the Slave Trade Act, 1873, 36 & 37 Vict. c. 88. Portugal was a party to the Brussel's General Act (St. R. & O., Rev. 1904, vol. xi., "Slave Trade," p. 1), for the suppression of the slave trade, and that Act has been, by Order in Council (*ibid.*), brought within the 1873 Act. The exceptional legislation as to the audit of expenditure during the Peninsular War is referred to above.

An Act of 1721 (8 Geo. I. c. 17, amended by 54 Geo. III. c. 126) provided for the levying of dues on British shipping for the relief of shipwrecked mariners and other distressed British subjects in the Portuguese dominions, and for a chaplain at Lisbon. Other Acts (9 Geo. II. c. 25 and 10 Geo. II. c. 14) made similar provisions for dues at certain Spanish ports and at the port of Leghorn respectively. These Acts are of interest as being the foundation of the Consular Advances Act, 1825, 6 Geo. IV. c. 87, which repealed them and gave a general power to British consuls to advance moneys to distressed British subjects in foreign countries, and to contribute towards chaplaincies, hospitals, and burial grounds. The 1825 system was terminated in 1891 (54 & 55 Vict. c. 36).

Dependencies.—Colonies in Asia.—*Portuguese India* consists of Goa on the Malabar Coast, covering an area of 1469 square miles, or a little larger than Cornwall, Damao, north of Bombay, and Dui, a small island west of Damao, together covering 169 square miles, or about the size of Rutlandshire. The seat of Government is at Panjim, the capital of Goa, and a governor-general administers the colony.

Portuguese Timor consists of the eastern portion of the island of Timor, situated in the Malay Archipelago, along with the territory of Ambeno and the island of Pulo Cambing, together having an area of 7330 square miles, or as large as Wales. The island of Timor was divided between Portugal and the NETHERLANDS (*q.v.*) by treaty of 1859, and the boundary was fixed by arrangement in July 1902. Up to 1896 Timor was administratively united with Macao (see below), but it was then created into an independent district, under its own governor.

Macao in China is situated on the island of Macao at the mouth of the Canton river, and, together with the tiny islands of Taipa and Coloane, forms a province of four square miles. The town of Macao is divided into two wards, one inhabited by Chinese and the other by non-Chinese, each being administered separately. The colony is under a governor.

Colonies in Africa.—*The Cape Verde Islands* are fourteen in number and cover an area of 1480 square miles, or somewhat larger than Cornwall. They are administered by a governor, and the seat of government is at Praia, the capital.

Portuguese Guinea, situated on the West Coast of Africa, is entirely surrounded on the land side by Senegambia (see FRANCE), and has a total area of 13,940 square miles, or about half the size of our SIERRA LEONE protectorate (*q.v.*). By the Convention of May 12, 1886, with France the boundaries of the colony were fixed. Portuguese Guinea includes the archipelago of Bijagoz and the island of Bolama. The province is administered by a governor assisted by a council.

S. Thomé and Príncipe are two islands constituting a province, and having an area of 360 square miles, or as large as Huntingdonshire. The islands are administered by a governor.

Angola (or *Portuguese West Africa*) is bounded on the north by French Congo (see FRANCE) and the CONGO INDEPENDENT STATE (*q.v.*), on the east by RHODESIA (*q.v.*), on the south by German South-West Africa (see GERMAN EMPIRE, Vol. VI. p. 368), and on the west by the Atlantic Ocean, and has a total area of 484,800 square miles, or rather larger than our three Rhodesian protectorates taken together (see RHODESIA).

The colony is under a governor-general, and for administrative purposes is divided into six districts.

Portuguese East Africa runs all along the east of our African possessions of SWAZILAND, the TRANSVAAL, RHODESIA and South and South-East of NYASALAND (*q.v.*) until it reaches its northern boundary (German East Africa, see GERMAN EMPIRE, Vol. VI. p. 368), and has a total area of 293,400 square miles, or rather larger than the CAPE OF GOOD HOPE (*q.v.*). In 1891 the name of the colony was changed from Mozambique to the State of East Africa. The colony is administered by a governor-general, appointed for three years. The seat of government is at Lourenço Marques. The colony is divided into three districts, viz. Mozambique, Zambezia, and Lourenço Marques. Two chartered companies, namely, the Mozambique Company and the Nyasa Company, have sovereign rights and administer large regions, the former the Manica and Sofala regions, and the latter the region between the Rovuma, Lake Nyasa, and the Lurio.

[See *Colonial Office List*; *Encyclopædia Britannica*.]

Positive Law.—See JURISPRUDENCE.

Posse comitatus.—It is the duty of every person in a county to be ready and apparelled, at the command of the sheriff and the cry of the county, to arrest felons, whether within franchise or without; and default entails fine. This was declared the law in 1275 (Stat. West. Prin., 3 Edw. I. c. 9), and continues to the present day (50 & 51 Vict. c. 35, s. 8 (1)). It applies, irrespective of the existence of writs or warrants (see ARREST); but owing to the establishment of the county police, the sheriff does not now pursue or arrest felons in England, though the old practice continues in the United States.

Where the sheriff finds any resistance in the execution of any writ, he is bound to take with him the power of the county (*i.e.* all men whom he chooses between fifteen and seventy), and to go in proper person to do execution, and may arrest the resisters and commit them to prison. Resistance to the sheriff, etc., is a misdemeanor (50 & 51 Vict. c. 55, s. 8 (2); and see *R. v. Brown*, 1841, 1 Car. & M. 314). This was declared to be the law in 1285 (Stat. West. 2, 13 Edw. I. c. 39), and continues to the present day.

The use of the *posse comitatus* is now very rare in England, but common in the United States, and occasional in Ireland. It was not called out unless the sheriff found resistance or thought it likely (*Foljambe's Case*, 1601, 5 Co. Rep. 115b).

The existence of the power to use the *posse comitatus* makes it no answer by the sheriff, for non-execution of a writ, to say that he was deforced or resisted.

The police in a county form part of the power of the county, and it is illegal to refuse their assistance if the sheriff demands it (*A.-G. v. Kissane*, 1893, 32 L. R. Ir. 220, 255, in which case and *Miller v. Knox*, 1838, 4 Bing. N. C. 574; *R. v. Pinney*, 1832, 2 St. Tri. N. S. 354, 526; and *R. v. Vincent*, 1839, 9 Car. & P. 91, it is stated that justices of the peace are entitled to call out the *posse comitatus*). See RIOT.

[*Authorities*.—2 Co. Inst. 193; 3 Co. Inst. 163; Dalton, *Sheriff*, p. 354; Vin. Abr., tit. "Sheriff" (B); Bacon, Abr., "Sheriff" (N); Mather, *Sheriff Law*, 2nd ed. 1903.]

Possession.

TABLE OF CONTENTS.

Distinction between Actual and	Transfer of Possession	323
Legal Possession	Delivery	323
Nature of Possession	Entry under Title	324
Possession of Land	Dispossession	324
Acts of Ownership	Abandonment of Possession	326
Exclusive Occupation	Possession as a Source of Title	326
Possession of Goods	In Possession	328
Acquisition of Possession		

Distinction between Actual and Legal Possession.—The question has been much discussed whether possession is a fact or a right. Primarily, the term denotes a state of fact, which may be shortly described as exclusive physical control, but this state of fact carries with it legal advantages, and so is the source of rights. If the state of fact could always be ascertained with certainty, and if it always produced the normal legal effect, the subject of possession would present little difficulty; but neither supposition is true. It is frequently uncertain to whom the actual control of a thing is to be attributed, and, when this question is settled, the law may credit the advantages of possession to some person other than the apparent possessor. Or it may credit these advantages to a particular person, although the possession is disputed or is vacant. Hence arises the distinction between actual and legal possession. Actual possession denotes the state of fact; but the person to whom are credited the advantages of possession has the legal possession, whether he is the actual possessor or no. Legal possession, again, must be distinguished from lawful possession. Lawful possession is the possession of one who has a good title to possess; but a wrongful possession may be recognised as the foundation of legal advantages, and may therefore be a legal possession within the meaning of the phrase as just used. Legal possession, when not accompanied by possession in fact, is known as "possession in law."

A few examples will make the distinction clear. Ordinarily, actual and legal possession coincide. An occupying tenant of a house has the actual possession of the house, and can maintain trespass against an intruder; in other words, he has the legal possession as well. But if the occupier is a servant of the owner, he has only the actual possession; the legal possession is in his master, in whose name an action of trespass must be brought. If two men are present on a field, each claiming the possession, until one has prevailed the actual possession is undecided; but if either of them is entitled to the possession, the legal possession follows the title. Treasure hidden in a field, of which the possessor of the field is not aware, is, perhaps, in fact in the possession of no one, but the legal possession is not allowed to be vacant, and it is attributed to the possessor of the field. The following pages will furnish the authorities for these instances, and also for other cases in which the law either overcomes the doubts which attend actual possession, or boldly recognises possession as existing for legal purposes, although such recognition is in direct conflict with the actual fact. Possession is a matter of too great consequence in determining legal rights for it to be left in suspense, because the fact of physical control is doubtful, or even is entirely wanting.

Nature of Possession.—Possession is usually said to consist of two

elements—physical control and intention to possess; but in English law the latter element does not assume the same prominence as, in the shape of the *animus domini*, it has been thought to assume in Roman law. Ordinarily, it is implied from the acts which evidence physical control, and even the circumstance that it does not in fact exist, as in the case of concealed treasure, does not prevent legal possession from arising. The general rule of English law is that exclusive physical control gives legal possession, unless the apparent possessor holds only as servant or bailiff on behalf of another. The determining factors in legal possession are, then, the exercise of exclusive physical control, and the character in which this control is exercised. The facts which are taken to show exclusive physical control vary according as the subject-matter of the possession is land or goods.

Possession of Land.—Possession is shown in the case of land by suitable acts of ownership done upon the land to the exclusion of other persons claiming possession.

Acts of Ownership.—"When the object, as a whole, is incapable of manual control, and the question is merely who has *de facto* possession, all that a claimant can do is to show that he, or some one through whom he claims, has been dealing with the object as an occupying owner might be expected to deal with it, and that no one else has done so. *Omnia ut dominum gessisse* (C. 7. 32, *de poss.* 2) is, for English as well as for Roman lawyers, a good working synonym of *in possessione esse*" (Pollock and Wright, *Possession*, p. 30). It follows that the acts which will establish possession vary according to the character of the land, and if it is not capable of ordinary beneficial occupation, as if it is moorland or foreshore, slight acts of ownership will be sufficient to establish possession, at any rate in favour of persons who, by virtue of being adjacent owners, may not improbably be entitled to possession. "By possession is meant possession of that character of which the thing is capable" (*Lord Advocate v. Young*, 1887, 12 App. Cas. p. 556). Hence, in the case of uncultivated land, shooting over the land may be a sufficient act of ownership (*Harper v. Charlesworth*, 1825, 4 Barn. & Cress. 574, 584; 28 R. R. 405); and in the case of foreshore, such acts as taking sand or erecting groynes are important (see *FORESHORE*). [There is no possession in the fact that trees overhang (*Lemmon v. Webb*, [1895] A. C. 6).]

It is not necessary to prove acts of ownership over the whole of the area of which possession is claimed. Acts done upon one part of a tract of land are evidence of possession of the whole, provided there is such a common character of locality between the various parts as to make it a reasonable inference that the owner of the part is the owner of the whole (*Jones v. Williams*, 1837, 2 Mee. & W. p. 331; 46 R. R. 611; *Lord Advocate v. Lord Blantyre*, 1879, 4 App. Cas. p. 791; *Lord Advocate v. Wemyss*, [1900] A. C. 48). This inference is easily raised in the case of an enclosed area. "In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same enclosure, for the ownership of one part causes a reasonable inference that the other belongs to the same person" (*per* Parke, B., in *Jones v. Williams*, *supra*). But the area in question may be naturally defined, as where it is a belt of trees (*Stanley v. White*, 14 East, 332; 12 R. R. 544), or it may be mapped out by the acts of ownership themselves.

Exclusive Occupation.—To constitute possession of land, the acts of ownership must be exclusive, that is, there must be no other persons

exercising rights of ownership or claiming possession adversely to the alleged possessor (Holmes, *Common Law*, p. 235; see *Revett v. Brown*, 1828, 5 Bing. 7; 30 R. R. 526). Two persons, however, may have a joint possession (*Ward v. Ward*, 1871, L. R. 6 Ch. 789). The requirement of exclusive user has sometimes been stated in such terms as to imply that there must be power to exclude all foreign interference (Savigny, *Possession*, Sir Erskine Perry's translation, p. 147); but this is not correct. It is sufficient that foreign interference is in fact excluded. "That occupation is effective which is sufficient as a rule, and for practical purposes, to exclude strangers from interfering with the occupier's use and enjoyment" (Pollock and Wright, *Possession*, p. 13). Enclosure, by fences or otherwise, is the usual mark of exclusive possession (*Coverdale v. Charlton*, 1878, 4 Q. B. D. 118; *Seddon v. Smith*, 1877, 36 L. T. 168), but this is not necessary. The question is whether other claimants are in fact excluded. Moreover, the requirement must not be pressed too far, and, especially in the case of foreshore, absolute exclusion is not to be looked for. "The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the right" (*per* Lord Watson in *Lord Advocate v. Young*, 1887, 12 App. Cas. 544).

In numerous cases, acts of ownership which, *prima facie*, would show possession, fail of this effect because they are not exclusive. A lodger who has separate rooms in a house is not deemed to have possession if the duty of attending to the rooms devolves upon the landlord or his servants (*Smith v. St. Michael, Cambridge*, 1860, 3 El. & El. 383; see *per* Blackburn, J., in *Allan v. Liverpool*, 1874, L. R. 9 Q. B. 191). Otherwise, if the lodger takes care of the rooms himself (*Lane v. Dixon*, 1847, 3 C. B. 776; 71 R. R. 484). A licence is distinguished from a lease, on the ground that it does not confer exclusive possession (*Taylor v. Caldwell*, 1863, 3 B. & S. 832). The inference of possession that would be raised from the pasturing of cattle is rebutted if the pasturing is done in the exercise of a right of cattlegate, which does not require exclusive possession (*Rigg v. Earl of Lonsdale*, 1857, 1 H. & N. 923). And so cricket elevens have no possession of the field in which they are playing at the invitation of the owner (*Holmes v. Bagge*, 1853, 1 El. & Bl. 782). On the other hand, if an owner has given up land for purposes which practically require exclusive occupation, as to dig for coprolites, he does not retain possession by reserving the right to enter and inspect (*Roads v. Trumpington*, 1870, L. R. 6 Q. B. 56).

Possession of Goods.—In the case of goods, possession may take the form of actual grasping or detention, and so admits of being established with the utmost certainty. On the other hand, it has to be admitted where actual grasping is absent, and the element of physical control is almost if not quite non-existent. Possession may then be regarded as the result of a special rule of law (see Pollock and Wright, *Possession*, p. 37). In principle, the requirements of possession are the same as in the case of land, namely, physical control to the exclusion of others, and ordinarily the test is applied strictly in the case of wild animals. Fresh pursuit does not give possession. There must be an effective capture (Holmes, *Common Law*, 217). So it has been held that fish taken in, a seine are not reduced into possession so long as the net remains open (*Young v. Hitchens*, 1844, 6 Q. B. 606). All but reducing into possession is not the same as reducing into possession. On the other hand,

in the whale fishery special customs regulate the possession of whales without the necessity of completing the capture (*Fennings v. Lord Grenville*, 1808, 1 Taun. 241; 9 R. R. 760; *Littledale v. Scaith*, 1788, *ibid.* 243 n.).

Where goods are placed in a building they are deemed to be in the custody of the possessor of the building, at least where the building is not open to the public. Where it is open to the public, it is necessary to inquire into the mode in which the goods have come there. In *Bridges v. Hawkesworth*, 1851, 21 L. J. Q. B. 75, a parcel of bank notes was dropped on the floor of a shop, and it was held that they did not thereby pass into the custody of the shopkeeper. Consequently, a person who found them was entitled as against the shopkeeper. The notes, it was said, were not within the protection of the shopkeeper's house. But where a customer lays his pocket-book on the counter of a bank, or on a table in a shop, and forgets to take it away, it seems the result may be different (*Kincaid v. Eaton*, *M'Avoy v. Medina*, referred to in *Holmes, Common Law*, 222). The rule that the possession of a house carries with it the possession of goods inside applies to land generally (see *R. v. Rowe*, 1859, Bell's C. C. 93). Hence the possessor of land has been held to be in possession of a prehistoric boat found embedded in the soil (*Elwes v. Brigg Gas Co.*, 1886, 33 Ch. D. 562). In such a case there is no specific intention to possess, such as was required in Roman law, and either the intention must be implied from the general intention to exclude strangers from the house or land, or it must be taken to be a positive rule of law that the possession of real estate carries with it the possession of all chattels situate thereon (Pollock and Wright, *Possession*, p. 41). In other words, the intention is not regarded. It is sufficient that the exclusion from the land, as a general rule, of strangers, secures their exclusion also from interference with the chattel. In *R. v. Rowe*, *supra*, the property in iron, taken by a stranger from the bottom of a canal, was held to be well laid in the canal company, thereby implying that the legal possession was in the company; and this was held by Chitty, J., in *Elwes v. Brigg Gas Co.*, *supra*, to be conclusive as to the possession of the prehistoric boat. "The boat was embedded in the land; a mere trespasser could not have taken possession of it, he could only have come at it by further acts of trespass, involving spoil and waste of the inheritance."

The presumption of law was carried to its full extent in the case of *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44. There the defendant, while cleaning out under the plaintiffs' orders a pool of water on their land, found two rings. Nothing was known as to the ownership of the rings, and the defendant refused to deliver them to the plaintiffs. In an action of detinue they established their right to recover the rings by virtue of the prior possession, and the rule of law as to the possession of chattels found upon land was laid down by Lord Russell, C.J., Wills, J., concurring, as follows:—"The general principle seems to me to be that where a person has possession of a house or land with a manifest intention to exercise control over it, and the thing which may be upon or in it, then, if something is found on that land whether by an employee of the owner or a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*. And *Bridges v. Hawkesworth*, *supra*, was distinguished on the ground already adverted to, that in that case the notes were dropped in a public part of the shop, and there was not that actual exclusion of strange

upon which *de facto* possession is founded, [and where during the possession of the sheriff under a writ of *fi. fa.* the judgment debtor put a sum of money into the drawer of a desk the sheriff was held to be in possession of the money, the principle last referred to being held applicable (*Johnson v. Pickering*, [1907] 2 K. B. 437)].

In the case both of land and goods, the legal possession is not attached to the actual possession if the possessor holds in the character of bailiff or servant for another (*Bertie v. Beaumont*, 1812, 16 East, 33; 22 R. R. 802; *White v. Bayley*, 1861, 10 C. B. N. S. 227; *Mayhew v. Suttle*, 1854, 4 El. & Bl. 347). Similarly, a person holding land as a tenant for years is denied the special form of legal possession known as seisin. The English law, however, differing herein from the Roman law, does not refuse legal possession to bailees (*Holmes, Common Law*, p. 211).

Acquisition of Possession.—The preceding statements as to the nature of possession indicate the various requirements for its acquisition, transfer, and loss. The original acquisition of possession (OCCUPATION) does not often come into question. In the case of land in England it can only occur under exceptional circumstances (see Pollock and Wright, *Possession*, p. 45). In the case of chattels, the most usual case is the capture of wild animals (*ibid.*, p. 124). The acquisition is complete as soon as possession has been effectively obtained, though sometimes, as in the cases of the whale fishery already referred to, the law intervenes with a positive rule in order to prevent strife.

Transfer of Possession.—Transfer of possession may take place either with the consent of the existing possessor (delivery of possession) or against his consent (dispossession). The distinction is important with respect to the effect ascribed in law to the physical elements in possession. Slight acts of control will be sufficient to vest the possession in a new possessor when he takes with the consent of the former possessor. He gets, it has been said, the goodwill of his predecessor's occupation (Pollock and Wright, *Possession*, p. 14). On the other hand, in a case of dispossession, no presumption arises in favour of the new possession (unless the new possessor enters under title), and the new possessor must make good his occupation. "Delivery is favourably construed, taking is put to strict proof; and this, not by calling in aid any presumption of right, but on the ground that the reality of *de facto* dominion is measured in inverse ratio to the chances of effective opposition" (*ibid.*).

Delivery.—Formerly delivery of possession, in the form of livery of seisin, was an essential element in the conveyance of land (see FEOFFMENT), and it was effected either by actual entry on the land (livery in deed) or in sight of the land (livery in law) (Co. Litt. 48 a, b); in the latter case the possession was not complete till the entry of the new possessor, and in both cases it was necessary that there should be no other person present claiming ADVERSE POSSESSION (*Doe v. Taylor*, 1833, 5 Barn. & Adol. 575). The immediate freehold now lies in grant (8 & 9 Vict. c. 106, s. 2), and livery of seisin has become practically obsolete; but in order that a new possessor may be able to maintain trespass, it is still necessary that he should have actually entered on the land (*Ryan v. Clark*, 1849, 14 Q. B. 73; *Harrison v. Blackburn*, 1864, 17 C. B. N. S. 691). Upon such entry his possession will be deemed to extend to the whole area which the former possessor intended to deliver to him (*Low Moor Co. v. Stanley Coal Co.*, 1876, 34 L. T. 186).

Delivery of goods may take place by actual delivery to the transferee or his servant, and in this case there is no difficulty. But it may also be effected by placing the goods under the control of the transferee without actually putting them into his hands. Under this head falls the so-called symbolical delivery, as where the keys of a warehouse are delivered with the intention of delivering possession of the goods in the warehouse. The correct view appears to be that such delivery is not merely symbolical, but depends upon the transferee having obtained, by delivery of the key and the voluntary withdrawal of the transferor, the actual control of the goods. The delivery, it was said by Lord Hardwicke in *Ward v. Turner*, 1752, 2 Ves. 431, is not a mere symbol; "delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of possession, because it is the way of coming at the possession or to make use of the thing; and therefore the key is not a symbol, which would not do." It is the same where goods are contained in a locked box. Delivery of the key will operate as a delivery of the goods; but if the owner delivers the box and keeps back the key, it has been held that the contents of the box are not delivered (*Reddel v. Dobree*, 1839, 10 Sim. 244; 59 E. R. 607; 51 R. R. 233). [Delivery of part of the goods may be a delivery of the whole if both parties intend it as a delivery of the whole, but if either of them dissents it is not, and the onus is upon those who say that it was so intended (*Kemp v. Falk*, 1882, 7 App. Cas. 573, 586).]

The principle that one person may hold goods on behalf of another, the legal possession being then attributed to the latter, enables delivery of goods to be made by attornment. Thus, if A., who is in possession of goods, sells them to B., and agrees to hold them on his behalf, this operates as a delivery to B. (*Elmore v. Stone*, 1809, 1 Taun. 458; 10 R. R. 578). So if C. has the custody of goods on behalf of A., and A. wishes to deliver them to B., this is effected by C. agreeing to hold on behalf of B. But for this purpose the mere delivery by A. to B. of the indicia of title, such as a transfer order, is not sufficient. The order must be lodged with C., and accepted by him (*Castle v. Sworder*, 1861, 6 H. & N. 828).

Entry under Title.—In matters turning upon possession, the English law does not exclude the question of title. On the contrary, it accepts title as conclusive of the question of possession, and notwithstanding that the actual possession is in dispute, it awards the legal possession to whichever of the two claimants has the better title to possess (*Reading v. Royston*, 1702, Salk. 423). Hence, if there are two persons in a field, each asserting that the field is his, and doing some act in assertion of his right, "the person who has the title is in actual possession, and the other is a trespasser" (*Jones v. Chapman*, 1847, 2 Ex. Rep. p. 821 *per* Maule, J.). And slight acts of possession will be sufficient to bring the principle into play, and to vest the legal possession in the person entering with title (*Lows v. Telford*, 1876, 1 App. Cas. 414). [Possession obtained by force, even by the rightful owner, is wrongful possession (2 Rich. II. Stat. 1, c. 8), so that a person whose possession is wrongful may recover damages for an independent wrong committed in the course of a forcible entry (*Beddell v. Maitland*, 1881, 17 Ch. D. 174).]

Dispossession.—When a stranger enters upon land without title the law makes no presumption in favour of his possession, and, although the legal possession vests in him, this depends solely upon his effective occupation of the land, and does not extend beyond the area of effective

occupation. Moreover, an occupation which might be effective for the purpose of giving the intruder possession as against another stranger, and the right to bring trespass for a disturbance of his possession, does not necessarily give possession as against the person who has been dispossessed. "A mere trespasser cannot by the very act of trespass immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession (*Browne v. Dawson*, 1840, 12 Ad. & E. 624, *per* Lord Denham, C.J.). In that case, an occupation of seven days was held not to give the intruder a right to maintain trespass against the previous possessor who had re-entered and ejected him (see *Scott v. Brown & Co.*, 1885, 51 L. T. 746).

For the purpose of the Statute of Limitations, time runs against an owner of land from the date when he either is dispossessed or discontinues the possession (Real Property Limitation Act, 1833, s. 3). Discontinuance, however, does not mean simply the abandonment of possession. There is no interruption of the possession for this purpose unless the abandonment of possession by one person is followed by the actual possession of another person (*McDonnell v. McKinty*, 1847, 10 Ir. L. R. p. 562; *Smith v. Lloyd*, 1854, 9 Ex. Rep. 562; *Trustees' Agency Co. v. Short*, 1888, 13 App. Cas. p. 799). In determining whether dispossession has taken place, the principles already enunciated apply, but regard must be paid to the fact that possession of land is often maintained by slight acts of user. On the other hand, an adverse possession must be shown by definite acts of occupation. Hence acts of temporary user, not inconsistent with the owner's enjoyment of the soil for the purpose for which it was intended—as where it was being kept as the site for an intended street—do not amount to dispossession (*Leigh v. Jack*, 1879, 5 Ex. D. 264; see *Tottenham v. Byrne*, 1861, 12 Ir. R. C. L. 376). Questions of dispossession not infrequently arise in determining boundaries; and an encroachment may be made upon a strip of adjacent land, provided the occupation of it is clear (*Norton v. L. & N.-W. Rly. Co.*, 1879, 13 Ch. D. 268); [and a railway company may be dispossessed even of lands which are not superfluous lands (*Midland Rly. Co. v. Wright*, [1901] 1 Ch. 738)]; though the rights of the adjoining owner will not be allowed to be easily taken away, if from the nature of the ground he could have been expected to do very little to show his ownership (see *Searby v. Tottenham Rly. Co.*, 1868, L. R. 5 Eq. 409; and as to the possession of boundary walls, see *Stedman v. Smith*, 1857, 8 El. & Bl. 1; *Phillipson v. Gibbon*, 1871, L. R. 6 Ch. 428; *Waddington v. Naylor*, 1889, 60 L. T. 480). [The intention is all-important. The erection of gates enclosing a piece of land may on the facts be an equivocal act (*Littledale v. Liverpool College*, [1900] 1 Ch. 19).] The filling up of a gravel pit and cultivation of the site will give possession, so as to make the statute run against the owner (*Smith v. Stocks*, 1869, 17 W. R. 1135), but in an open quarry adverse possession extends only to the part which is worked (*McDonnell v. McKinty*, 1847, 10 Ir. L. R. 514); and in the case of a mine, it seems a stranger cannot gain possession except of the part which he actually marks out, as by driving levels (*Ashton v. Stock*, 1877, 6 Ch. D. 719; see *Low Moor Co. v. Stanley Coal Co.*, 1876, 34 L. T. 186).

The same principle applies in regard to movables, and a man who is not entitled to take possession can, it has been said, obtain possession only of that which he actually lays hold of (*Ex parte Fletcher*, 1877,

5 Ch. D. 809). Where an entry was made on behalf of a bill of sale holder in order to terminate the apparent possession of the grantor, it was held that this was effected by the person entering being in a position to exclude the grantor, although by reason of the goods being locked up he could not get at them (*Furber v. Finlayson*, 1876, 24 W. R. 370).

Abandonment of Possession.—The distinction between possession with and without title is important also in relation to the abandonment of possession. It is usually said that possession continues so long as the possessor is able to reproduce at will the physical control upon which his acquisition of the possession was founded, but, in the case of land, if he is a mere intruder, it is clear that something more than the mere power to resume occupation is necessary to preserve his possession. A trespasser who enters upon and occupies land will not be deemed to remain in possession if he quits the land and leaves behind him no indication that he means to return (see *Worrmsam v. Vandenbrande*, 1868, 17 W. R. 53); and, after he has thus abandoned possession, it seems that the legal possession reverts in the former possessor without fresh entry (*Trustees' Agency Co. v. Short*, 1888, 13 App. Cas. 793). "If a person enters on the land of another, and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place" (*ibid.*) [see *Willis v. Horne*, [1893] 2 Ch. 545]. And so a possession held under a title, which is not being maintained by any actual user, will cease upon the cessation of the title (*Brown v. Notley*, 1848, 3 Ex. Rep. 219; 77 R. R. 608). On the other hand, so long as the title continues, the legal possession will remain in the person entitled, notwithstanding his want of occupation, until possession is actually taken by a stranger. It has been doubted, indeed, whether it is competent for an owner, even by intentional abandonment, to divest himself of legal possession (Pollock and Wright, *Possession*, p. 124).

Possession as a Source of Title.—Mere possession is protected in trespass as against an intruder who cannot show title in himself or in some person by whose authority he enters. It is no defence that he shows title in another unless he also has the authority of that other (*Chambers v. Donaldson*, 1809, 11 East, 65; 10 R. R. 435, overruling *Trevilian v. Pyne*, 1700, 1 Salk. 107). In other words, the defendant in an action of trespass cannot set up the *jus tertii*. To maintain the action, however, the plaintiff must show that he was in possession at the time when the trespass was committed (*Hodson v. Walker*, 1872, L. R. 7 Ex. p. 69). And a right to possession will not suffice; consequently a lessee cannot maintain trespass till he has entered (*Wheeler v. Montefiore*, 1841, 2 Q. B. p. 142). An exception exists, however, in the case of a lessor on a tenancy at will, who, as well as the lessee, can maintain trespass against a wrongdoer (Pollock and Wright, *Possession*, p. 93).

In addition to insuring protection against disturbance at the hands of strangers, possession is either evidence of title or is itself a source of title, so as to enable the possessor to recover the land in case he should have been deprived of possession. "Possession is *prima facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee" (*Doe v. Barnard*, 1849, 13 Q. B. 945; 78 R. R. 564). Viewed in this light, the evidence is liable to be rebutted, and it was formerly the law that possession did not give a title to recover in ejectment as

against a wrong-doer who could show that the real title was in another (*Doe v. Barber*, 1788, 2 T. R. 749; 1 R. R. 611; *Doe v. Barnard*, 1849, 13 Q. B. 945; 78 R. R. 564; *Nagle v. Shea*, 1874, 8 Ir. R. C. L. 224). At the present time, however, it seems that mere possession gives a title to recover the land as against a wrong-doer, and it is not open to the latter to show that the plaintiff's title is defective. *Davison v. Gent*, 1857, 1 H. & N. 744, is an authority that the plaintiff will not be defeated simply because he does not show a good title, and *Asher v. Whitlock*, 1865, L. R. 1 Q. B. 1, that possession is in itself a sufficient title. "I take it as clearly established," said Cockburn, L.C.J., in the latter case, "that possession is good as against all the world, except the person who can show a good title." Practically this means that the old law as to seisin now applies to possession. Seisin, though tortious, gave a good title against all except the true owner, and possession seems now to have the same result.

Where the possessor without title remains in possession for the time required under the Statute of Limitations to extinguish the title of the true owner—usually twelve years (see LIMITATION)—he then acquires a title which is good against all the world (*Doe v. Sumner*, 1845, 14 Mee. & W. 39; 69 R. R. 653), and which is free from any covenants or restrictions affecting the old title (see *Tichborne v. Weir*, 1892, 67 L. T. 735); [but only when the statutory owner vested the lessee, and the lease to which the covenants and restrictions were incident was extinguished by the possession; restrictive covenants the burden of which is paramount to the estate of the dispossessed owner continue to affect the land notwithstanding the possessory title (*Nisbet v. Potts*, [1905] 1 Ch. 391)]. If, however, there are successive possessors, no one of whom remains in possession for the statutory period, it has been doubted in which of them the title is to be deemed to be vested when that period has elapsed. In *Dixon v. Gayfere*, 1853, 17 Beav. 421, it was considered by Romilly, M.R., that the one actually in possession at the end of the time would be entitled to retain possession against the rest; but the opinion was founded upon the doctrine, now apparently erroneous, that possession did not give a good title on which to recover in ejectment. [In *Asher v. Whitlock*, *ubi supra*, the decision in *Dixon v. Gayfere* was said to be wrong in law.] It seems more probable, at any rate where the possessors are in the position of successive disseisors, that each would have a right to recover against the subsequent possessors, and the last possessor would not be safe until all the rest had been successively barred by lapse of time (see Pollock and Wright, *Possession*, p. 95).

In the case of goods, legal possession is recognised more readily than in the case of land, and the mere right to possession is sometimes described as "constructive possession," and is allowed the advantages of legal possession. Thus the grantee of wreck can maintain trespass against a wrong-doer for taking goods stranded within his liberty, though he has not seized them; and this upon the principle that "the right to the possession draws after it a constructive possession which is sufficient to support the action" (*Bailiffs of Dunwich v. Sterry*, 1831, 1 Barn. & Adol. 831, see p. 842; 35 R. R. 471; *Smith v. Miller*, 1786, 1 T. R. 480). So, trover lies at the suit of the grantee of foreshore for seaweed cast upon the shore (*Brew v. Haren*, 1877, 11 Ir. R. C. L. 198). But this principle has not been carried so far as to make such seaweed, before it has been gathered by the owner of the shore, the subject of larceny (*R. v. Clinton*, 1869, 4 Ir. R. C. L. 6).

The right of a finder of a chattel to recover on his mere possession against a wrong-doer was conclusively established by *Armorie v. Delamirie*, 1722, 1 Stra. 505; 1 Sm. L. C., 10th ed., p. 343. The plaintiff, a chimney-sweeper's boy, found a jewel and carried it to the shop of the defendant, who was a goldsmith, to know what it was. The defendant's apprentice, under pretence of weighing it, took out the stones, and the defendant offered the plaintiff three halfpence for it. The plaintiff refused to accept the money, and the socket was handed back to him without the stones. It was ruled by Pratt, L.C.J., that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover; and in default of the defendant producing the jewel, the jury were directed to assess the damages according to the value of the best jewel which would fit the socket; and this they did.

In Possession.—As applied to an estate or interest, these words usually mean that the right is immediate, and not in reversion, remainder, or expectancy. They have this meaning accordingly, in secs. 2 (5) and 58 (1) of the Settled Land Act, 1882 (*per* Baggallay, L.J., in *In re Jones*, 1884, 26 Ch. D. 741; *per* Cotton, L.J., in *In re Atkinson*, 1886, 31 Ch. D. 580); and a person may have, for the purposes of the Act, an estate in possession, notwithstanding that the actual possession or receipt of income is in a trustee for him, or (if he is an infant) in his guardian (*In re Morgan*, 1883, 24 Ch. D. 116); or although there are prior charges which absorb the income (*In re Jones, supra*; *In re Clitheroe Estate*, 1885, 31 Ch. D. 135). Sometimes, however, the phrase is treated as equivalent to "vested," and the words "entitled to an estate tail in possession" have, to effectuate the intention of particular instruments, been construed as meaning "entitled to a vested estate" in the property, although the actual possession was postponed to an existing life estate (*Martelli v. Holloway*, 1872, L. R. 5 H. L. 532; *Foley v. Burnell*, 1783, 1 Bro. C. C. 274; 28 E. R. 1125; 4 Bro. P. C. 319; 2 E. R. 216).

Possessio Fratrīs.—See ABATEMENT OF FREEHOLD.

Possession-Money.—See SHERIFF.

Possession (of Ships).—The Admiralty Court (now Division) has always had jurisdiction to grant possession of a ship to its owner as against a wrong-doer, and for that purpose to grant a warrant of arrest against the ship (*The Warrior*, 1818, 2 Dod. 289, Lord Stowell; *In re Blanshard*, 1823, 2 Barn. & Cress. 249; *The Peggy*, 1820, 3 Dow. & Ry. 178n.); but until 1840 it could not determine questions between rival claimants setting up title to a ship. In that year the Admiralty Court Act gave the Court power to decide all questions as to title or ownership of any ship or vessel, or the proceeds thereof remaining in the registry arising in any cause of possession (s. 4), and consequently to inquire into the validity of title to a ship, *e.g.* whether a sale gave a good title to the purchaser (*The Eliza Cornish*, 1853, 1 Sp. 36; *The Empress*, 1856, Swa. Ad. 160; *The Glasgow*, 1856, *ibid.* 145; *The Victor*, 1865, 13 L. T. N. S. 21; *The Margaret Mitchell*, 1858, Swa. Ad. 382). The Court was thus held to have power to order a mistake in a ship's register to be corrected, which prejudiced

the title of a plaintiff entitled to a decree of possession (*The Rose*, 1873, L. R. 4 Ad. & Ec. 6). By the practice of the Admiralty Court the person actually in possession of the ship was always favoured, and the plaintiff who sought to disturb him had to prove his claim clearly (*The Victoria*, 1859, Swa. Ad. 408), equitable owner of half the ship held entitled to retain possession as against the legal owner of more than half; and a party claiming title to a ship could not rely on two conflicting titles (*The Margaret Mitchell*, 1858, above, 385). Before the Judicature Act the suit had to be instituted by legal owners, and the Court did not in practice allow its process to be set in motion for protecting merely equitable interests, though "it was not merely ministerial," and it could hold its hand where it was equitable to do so (*The Sisters*, 1802, 4 Rob. C. 275, and 5 *ibid.* 155; Williams and Bruce, *Admiralty Practice*, 28), and a distinction was recognised between "enforcing an equitable right at the instance of the party claiming it and refusing to enforce the claim of a legal owner to the disregard of an equitable right" (Dr. Lushington, *The Victoria*, above, at p. 410). By that Act equitable interests in ships were put on the same footing as legal (ss. 24, 25).

A master seeking to retain possession of a ship against the will of the majority of her owners can be dispossessed by a suit of possession, and the Court generally allows this to be done without "minutely considering the merits or demerits of his conduct," even though he be also a part-owner, if some special reason were shown, and even, it seems, without such (*The New Draper*, 1802, 4 Rob. C. 290; *The Johan and Siegmund*, 1810, Edw. 242), and even although he offers security for the value of the other owner's interests (*The Kent*, 1862, Lush. 495). Power to remove a master of any ship within the jurisdiction is now given by the Merchant Shipping Act to the High Court (s. 472), and naval Courts (s. 483), in the case of all seagoing ships in the United Kingdom or unregistered British ships (except certain fishing boats), or ships registered in a British possession when out of the jurisdiction of its Government (s. 486).

In the case of a foreign ship, the Court is disinclined to adjudicate concerning its possession; it only does so in order to prevent inconvenience and loss which would arise from resorting to Courts in foreign countries, and only generally, though not necessarily, if the consul of the country to which the ship belongs consents to the Court exercising this jurisdiction, or if its doing so only carries into effect the decision of a foreign Court (*The Martin of Norfolk*, 1802, 4 Rob. C. 297; *The See Reuter*, 1811, 1 Dod. 23; *The Johan and Siegmund*, above; *The Evangelistria*, 1876, 2 P. D. 241). Notice must in such a case be given to the foreign consul; in the affidavit to lead warrant of arrest the national character of the ship must be stated, and service of such notice and a copy of such notice annexed thereto (R. S. C., Order 5, r. 16; Williams and Bruce, 258). Where the main question in the case of a foreign ship depends on foreign municipal law, the Court will not decree possession, and so deprive a party of his possible rights (Lord Stowell, *The Johan and Siegmund*, above). But it will hear a suit instituted by a British subject to recover possession of a ship which has come to this country in the possession of foreigners (*The Experimento*, 1815, 2 Dod. 38).

In a suit between co-owners for the possession of a ship, the majority may arrest her and get a decree of possession to enable them

to send her on a particular voyage (*The New Draper*, above, $\frac{9}{18}$ of her shares held enough for this purpose, though master was part-owner; *The Kent*, above, $\frac{4}{8}$ enough; *The Elizabeth and Jane*, 1841, 1 Rob. W. 282, $\frac{1}{2}$ not enough; *The Egyptienne*, 1825, 1 Hag. Adm. 346n.); and the minority cannot retain possession by offering to give full security for the value of the majority's interest (*The Kent*, above); but the majority may have to give security for the minority's interest (*The Apollo*, 1824, 1 Hag. Adm. 306). The Court, however, will not at the suit of a British part-owner of a foreign ship arrest her till bail is given for her safe return to her port abroad (*The Graff Arthur Bernstoff*, 1854, 2 Sp. 31), unless proof is given that the remedy (by action of restraint) which exists in England exists in that country also. Owners who do not support an application to change possession are presumed not to wish it changed (*The Valiant*, 1839, 1 Rob. W. 67, where a plaintiff died while a possession cause was pending, and his personal representative did not authorise proceeding, the Court deducted his share from the interest of the promoters).

A ship may be sold in a suit between co-owners touching her ownership, possession, employment, or earnings, if she is registered in England or Wales, by order of the Court (1861, Admiralty Court Act, s. 8).

In a possession suit the Court will grant a monition for producing the ship's papers or register (*The Frances of Leith*, 1820, 2 Dod. 420; *The Peggy*, 1820, 3 Dow. & Ry. 178n.); and the Division can now in such an action order the delivering up of the ship's register certificate to the majority of part-owners (*The Native Pearl*, 1877, 3 Asp. 515). In a possession suit, bail may be given for the ship either by consent of parties or by order of the Court, if this can be done without defeating the object of the suit (*The Gauntlet*, 1871, L. R. 3 Ad. & Ec. 319). In an action of possession, persons who have not appeared and who are interested in the ship may be ordered by the Court to become parties to the suit, and payment of costs can be enforced from them (*The Native Pearl*, above). For forms of pleadings and decrees, see Williams and Bruce, 611, 620, 621.

[*Authorities*.—Williams and Bruce, *Admiralty Practice*, 3rd ed., 1902; Roscoe, *Admiralty Practice*, 3rd ed., 1903.]

Possession, Writ of.—See EXECUTION, Vol. V., at p. 499.

Possessory Action.—See TRESPASS.

Possessory Lien.—*Definition.*—A possessory lien is a right of a person who has possession of goods or chattels belonging to another person, to retain the possession thereof until the payment or discharge of some debt or obligation by the owner of the goods or chattels. A general lien is a right to retain the goods or chattels in respect of a general balance of account, or until the payment or discharge of a debt or obligation not necessarily incurred in respect of such goods or chattels. A particular lien is confined to debts and obligations incurred in respect of the goods or chattels subject to the lien. A possessory lien is a mere personal right to retain possession, and there is no right of sale incident thereto, even if the retention of the chattel is attended with expense (*Mulliner v. Florence*, 1878, 3 Q. B. D. 484; *Thames Iron Works v. Patent Derrick Co.*, 1860, 29 L. J. Ch. 714). Nor is there any right to make

a charge for rent, or for the expense of keeping the chattel (*Somes v. British Empire S. Co.*, 1860, 8 Cl. H. L. 338). Provision has, however, been made by the Merchant Shipping Act, 1894 (ss. 494-498), and by the Innkeepers Act, 1878, for the sale, in certain cases, of goods or chattels subject to the lien of a shipowner for freight, or of an innkeeper.

How Acquired.—A possessory lien may arise at common law, or by virtue of an agreement, express or implied. An innkeeper has, at common law, a general lien on the goods and chattels brought to the inn by a guest, for what is due for his lodging, board, and entertainment (*Thompson v. Lacy*, 1820, 3 Barn. & Ald. 283; 22 R. R. 385; *Mulliner v. Florence*, 1878, 3 Q. B. D. 484), even if such goods or chattels do not belong to the guest, provided they are brought to the inn as part of his luggage (*Robins v. Gray*, [1895] 2 Q. B. 501; *Threfall v. Borwick*, 1872, L. R. 7 Q. B. 711; *Yorke v. Grenaugh*, 1701, 2 Raym. (Ld.) 866). (See also INNKEEPER.) Common CARRIERS also have, at common law, a particular lien for their charges for carrying goods, whether the goods are the property of the person tendering them for carriage or not (*Exeter Carrier's Case*, cited 2 Raym. (Ld.) 867). But they have no general lien for charges due in respect of the carriage of other goods (*Wright v. Snell*, 1822, 5 Barn. & Ald. 350; 24 R. R. 413; *Rushforth v. Hadfield*, 1805, 6 East, 519; 8 R. R. 520; *Oppenheim v. Russell*, 1802, 3 Bos. & Pul. 42; 6 R. R. 604; *Butler v. Woolcott*, 1805, 2 Bos. & P. N. R. 64; 9 R. R. 615). (See also CARRIER.) Every person who repairs, alters, or otherwise bestows labour or skill upon goods or chattels has, at common law, a particular lien thereon for his remuneration—as in the case of a shipwright who repairs a ship (*Franklin v. Hosier*, 1821, 4 Barn. & Ald. 341; 23 R. R. 305; *Williams v. Allsup*, 1861, 10 C. B. N. S. 417), a printer who prints a paper (*Blake v. Nicholson*, 1814, 3 M. & S. 167), a trainer who trains racehorses (*Bevan v. Waters*, 1828, 3 Car. & P. 520; 33 R. R. 692; *Jacobs v. Latour*, 1828, 2 Moo. & P. 201), a stallion-keeper whose stallion covers a mare (*Scarfe v. Morgan*, 1838, 4 Mee. & W. 270; 51 R. R. 568), a miller who grinds corn (*Chase v. Westmore*, 1816, 5 M. & S. 180; 17 R. R. 301), [the repairer of a chattel held under a hire-purchase agreement obliging the hirer to keep and preserve the chattel from injury (*Keene v. Thomas*, [1905] 1 K. B. 136)],—and if work is bestowed on several chattels under one entire agreement, the lien for the whole price extends to all the chattels (*Blake v. Nicholson*, 1814, 3 M. & S. 167; 15 R. R. 455; *Marks v. Lahee*, 1837, 4 Sco. 137). But this common-law lien arises only where labour or skill is bestowed upon the goods or chattels. Where a mortgage deed was delivered to an auctioneer, in order that he might obtain payment of the amount due, it was held that he had not, at common law, any lien on the deed for his charges for several applications made by him for the money (*Sanderson v. Bell*, 1834, 2 C. & M. 304; 39 R. R. 776). So, a livery stable keeper or agister of cattle has no lien, at common law, for his charges for merely feeding horses or cattle (*Judson v. Etheridge*, 1833, 1 C. & M. 743; *Wallace v. Woodgate*, 1824, Ry. & M. 193; *Jackson v. Cummins*, 1839, 5 Mee. & W. 342; 52 R. R. 737; *Yorke v. Grenaugh*, 1701, 2 Raym. (Ld.) 866). As to the lien of an unpaid seller of goods, see Sale of Goods Act, 1893, ss. 41-43. And see SALE OF GOODS.

Except in the case of innkeepers, a general lien can only exist by virtue of an agreement, express or implied (*Bock v. Gorrisen*, 1861, 30 L. J. Ch. 39). Factors (see FACTOR), insurance brokers (see BROKER

(INSURANCE)), solicitors (see SOLICITOR), bankers (see BANKER AND CUSTOMER), WHARFINGERS (*Naylor v. Mangles*, 1794, 1 Esp. 109; 5 R. R. 722; *Spears v. Hartley*, 1798, 3 Esp. 81; 6 R. R. 814), and packers (*In re Witt*, 1876, 2 Ch. D. 489; *Green v. Farmer*, 1768, 4 Burr. 2214), have a general lien by implication from custom. Where, however, a usage or custom is relied upon as evidence of an implied agreement for a general lien, the usage or custom must be reasonable, and must be shown to have been acted upon in previous dealings between the parties, or be proved to be so notorious that they may reasonably be presumed to have contracted subject to it (*Rushforth v. Hadfield*, 1805, 6 East, 519; 8 R. R. 520; *Leuckart v. Cooper*, 1836, 3 Sco. 521; 43 R. R. 602; *Bleadon v. Hancock*, 1829, Moo. & M. 465; *Kirkman v. Shawcross*, 1794, 6 T. R. 14; 3 R. R. 103). Such a usage has been proved and given effect to in the case of calico-printers (*Webb v. Fox*, 1797, 2 Pea. 167; 4 R. R. 900; *Weldon v. Gould*, 1801, 3 Esp. 268; 6 R. R. 832), and dyers (*Savill v. Barchard*, 1801, 4 Esp. 52; 8 R. R. 524).

Except in the case of the lien of innkeepers or common carriers, who are bound by law to render their services to anyone requiring them, and except where otherwise provided by statute (as by the Factors Act, 1889, and the Sale of Goods Act, 1893, s. 25), a possessory lien is, as a general rule, effective only against the person who is liable to pay the debt or discharge the obligation secured thereby, and is confined to his rights in the goods or chattels at the time when the lien attaches (*Richardson v. Goss*, 1802, 3 Bos. & Pul. 119; 6 R. R. 727; *Buxton v. Baughan*, 1834, 6 Car. & P. 674; 40 R. R. 842; *Young v. English*, 1843, 7 Beav. 10; 49 E. R. 965; 64 R. R. 5; *In re Llewellyn*, [1891] 3 Ch. 145; *Copland v. Stein*, 1799, 8 T. R. 199; *Hollis v. Claridge*, 1813, 4 Taun. 807). There is one exception to this rule. If moneys or negotiable securities are deposited with a person who takes them in good faith, he will acquire the same right of lien, as against all the world, as he would have acquired against the person depositing them if such person had been the absolute owner thereof, provided that at the time when the lien attaches he has no notice of any defect in the title of such person (*Jones v. Peppercorne*, 1858, John. 430; 70 E. R. 490; *Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787; 8 E. R. 1622; 69 R. R. 204; *Misa v. Currie*, 1876, 1 App. Cas. 554; *Solomons v. Bank of England*, 1818, 13 East, 135; 12 R. R. 341; *Locke v. Prescott*, 1863, 32 Beav. 261; 55 E. R. 103).

Agreement inconsistent with Lien.—A person cannot have a lien which is inconsistent with any express or implied agreement between him and the person against whom the lien is claimed (*Forth v. Simpson*, 1849, 13 Q. B. 680; 78 R. R. 496; *Raitt v. Mitchell*, 1815, 4 Camp. N. P. 146; 16 R. R. 765; *Walker v. Birch*, 1795, 6 T. R. 258; *In re Bowes*, 1886, 33 Ch. D. 586), or which is inconsistent with the purpose for which the goods or chattels were delivered to him (*Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787; 8 E. R. 1622; 69 R. R. 204; *Frith v. Forbes*, 1862, 32 L. J. Ch. 10; *Wylde v. Radford*, 1864, 33 L. J. Ch. 51). Nor can a person acquire a lien upon goods or chattels of which he obtains possession unlawfully (*Madden v. Kempster*, 1807, 1 Camp. N. P. 12; *Walshe v. Provan*, 1853, 8 Ex. Rep. 843), or in some other capacity than that in which the lien is claimed (*Dixon v. Stansfeld*, 1850, 10 C. B. 398; *In re Taylor*, [1891] 1 Ch. 590).

How Extinguished or Lost.—A possessory lien is extinguished by a tender of the amount due, and may be lost by waiver, express or implied.

A waiver is implied whenever the conduct of the person entitled to the lien is such as to indicate an intention to abandon it, or is inconsistent with its continuance (*The Rainbow*, 1885, 53 L. T. 91; *In re Nicholson*, 1883, 53 L. J. Ch. 302; *In re Mason*, 1878, 10 Ch. D. 729). Thus, if he voluntarily parts with the possession of the goods or chattels, he thereby abandons his lien (*Sweet v. Pym*, 1800, 1 East, 4; 5 R. R. 497; *Hathesing v. Laing*, 1873, L. R. 17 Eq. 92), unless he is induced by fraud to part with such possession (*Wallace v. Woodgate*, 1824, 1 Car. & P. 575), or the circumstances under which he does so are consistent with the continuance of the lien, and are such as to clearly show that he intends to retain the lien (*Watson v. Lyon*, 1855, 7 De G., M. & G. 288; 44 E. R. 113; *North-Western Bank v. Poynter*, [1895] A. C. 56). So, if he sells the goods or chattels in order to reimburse himself (*Mulliner v. Florence*, 1878, 3 Q. B. D. 484; *Gurr v. Cuthbert*, 1843, 12 L. J. Ex. 309), or causes them to be taken in execution at his own suit (*Jacobs v. Latour*, 1828, 5 Bing. 130), or upon a demand being made for them by the owner, claims to retain them on some other ground, without mentioning the lien (*Weeks v. Goode*, 1859, 6 C. B. N. S. 367; *Boardman v. Sill*, 1808, 1 Camp. N. P. 410; *Kerford v. Mondel*, 1859, 28 L. J. Ex. 303), the lien is thereby waived. So, a waiver may be implied from his taking other security for the claim secured by the lien, if the nature of the security or circumstances under which it is taken be inconsistent with the continuance of the lien, or be such as to indicate an intention to abandon it, but not otherwise (*Cowell v. Simpson*, 1809, 16 Ves. Jun. 275; 33 E. R. 989; 10 R. R. 181; *Angus v. MacLachlan*, 1881, 23 Ch. D. 330; *Tamvaco v. Simpson*, 1866, L. R. 1 C. P. 363; [see also *In re Morris*, [1908] 1 K. B. 473]). A possessory lien is not affected by the circumstance that possession of the goods or chattels is obtained from the person entitled to the lien unlawfully, or without his consent (*Dicas v. Stockley*, 1836, 7 Car. & P. 587; *In re Carter*, 1886, 55 L. J. Ch. 230); nor by the circumstance that the claim secured by the lien becomes barred by the Statute of Limitations (*Spears v. Hartley*, 1798, 3 Esp. 81; 6 R. R. 814; *Curwen v. Milburn*, 1889, 42 Ch. D. 424), or the owner of the goods or chattels becomes bankrupt (*Robson v. Kemp*, 1802, 4 Esp. 233; 8 R. R. 831).

[*Authorities*.—See Addison on *Contracts*, 10th ed.; Chitty on *Contracts*, 14th ed.; Smith's *Mercantile Law*, 11th ed.]

Possessory Title.—See POSSESSION.

Possibility.—The chance of a person obtaining an estate was in law called a possibility (Wms. *R. P.*, 20th ed. 357). At common law both contingent remainders and executory interests were only possibilities and therefore transferable *inter vivos* (case cited, 4 Rep. p. 66). It is frequently stated in the text-books that there are two kinds of possibilities: a bare possibility (*e.g.* the expectation of the heir-apparent) and a possibility coupled with an interest (*e.g.* a contingent estate), the latter of which confers a transmissible though not a vested interest (*Jones v. Roe*, 3 T. R. 88; Wms. *R. P.*, *ubi supra*). But the different senses in which the word possibility may be used in law are referred to in Mr. Challis's clear note to his book on *Real Property* (p. 66). He there points out that three kinds of possibilities can be distinguished—(a) Those coupled with an interest—the chance of obtaining the estate—the subject of the contingent remainder or the executory interest. These possibilities devolve and are devisable. (b) Bare possibilities, *e.g.* the possibility of reverter on

breach of a condition, such possibilities devolved upon the heir at common law. (c) Absolutely bare possibilities. These are those referred to *supra* (e.g. the chance of succeeding which the heir-apparent has).

Possibilities were sometimes classed as common possibilities (*potentia propinqua*) and remote possibilities. A remote possibility is what is sometimes called "a possibility upon a possibility," and we find it laid down in Coke that the contingency on which a remainder must be limited must be a common possibility or *potentia propinqua*, and not a remote possibility (Co. Rep. 51). This doctrine was cited with approval, and adopted by Mr. Fearne in his work on *Contingent Remainders*. For a history of the doctrine and the criticisms made on it, see CONTINGENT REMAINDERS, Vol. III. p. 514. The doctrine, whatever its precise extent may be, has given rise to the well-known rule that "if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue" (Buller's *Note to Fearne*, 10th ed., vol. i. p. 565 (n.), quoted in *Whitby v. Mitchell*, *infra*). The rule, as thus stated, strangely enough did not come up for decision in the Courts till the comparatively recent case of *Whitby v. Mitchell*, 42 Ch. D. 494; 1890, 44 Ch. D. 85; and the Court there held that the old rule against "a possibility on a possibility" applicable to limitations of real estate, namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person as purchasers, is still existing, and has not been abrogated by the more modern law against perpetuities; the two rules being in fact independent and coexisting. And in *In re Frost*, 1889, 43 Ch. D. 246, the doctrine was extended so as to make void for remoteness limitations after the life estate of any husband the testator's daughter might marry, such limitations being to children of the daughter living at the death of the survivor of herself and her husband. The *ratio decidendi* was that the daughter might, after the testator's death, marry a person not born in the lifetime of the testator, and there might then be a limitation to the daughter for life, remainder to an unborn person, and a contingent remainder over to people living at the death of an unborn person—a double possibility. The rule is wholly distinct from and has nothing to do with the rule against perpetuities (*Whitby v. Mitchell*, *ubi supra*, and see *Re Ashforth*, [1905] 1 Ch. 535). The rule has no application to limitations of personal estate (*Re Bowles*, 1902, 2 Ch. 650).

Possible.—As to the meaning in the contract of the words "if possible," see *Wilson v. Rynock*, 1877, W. N. 164. See SOON.

Post-dating.—See BILLS OF EXCHANGE, xiii.; CHEQUE, 3.

Postea.—The *postea* was the indorsement on the record of a trial at Nisi Prius of what had been done at the trial. Its place is now taken by the certificate of the judgment, directed by R. S. C., Order 36, r. 42, to be in the form No. 17, Appendix B (*Annual Practice*, vol. ii.).

Post Entry.—A subsequent corrective entry made by an importer of goods who has already made an entry of them and delivered it to the Customs authorities, but finds that in it he understated the goods on his vessel. If, on the other hand, the first entry was excessive,

the amount overpaid or bonded is returned, upon the oath of the importer attested by the collector (see as to entries, article CUSTOMS).

Posthumous Child.—See EN VENTRE SA MERE.

The presumption in favour of the legitimacy of a child born within a competent time after a marriage has been determined by the husband's death is as strong as that in favour of offspring born during wedlock (see LEGITIMACY). Upon its birth it will, as a rule, be placed at once, as to rights and advantages, where it would have stood at its father's death, if at the time of that event it had been already born. It will not lose its heirship of lands in fee, though meantime the person who, failing the posthumous child, would be heir takes "*quasi by descent*" (*Shelley's Case*, 1579-1581, 1 Co. Rep. 93; 76 E. R. 206), and enjoys the mesne profits. And, generally, in all other matters of property the posthumous child is treated as a child living at its father's death (*Trower v. Butts*, 1823, 1 Sim. & St. 181; 57 E. R. 72; 24 R. R. 165); that is to say, if it is to its interest, and not to its detriment, so to be treated (see *Blason v. Blason*, 1864, 33 L. J. Ch. 403; and 2 De G., J. & S. 665; 46 E. R. 534; *Pearce v. Carrington*, 1873, L. R. 8 Ch. 969; and *Villar v. Gilbey*, [1907] A. C. 139), in the last of which all the law affecting posthumous children is dealt with at large.

For example: while a child is still *en ventre sa mère*, it may have a guardian under 12 Chas. II. c. 24, s. 8; a writ to stay waste will be granted in its interests (*Lutterel's Case*, "in my Lord Bridgman's time," cited in *Hale v. Hale*, 1692, Prec. in Ch. 50; 24 E. R. 25); is deemed, if born alive after its father's death, to have been "dependent" upon him within the meaning of the Workmen's Compensation Act, 1897, 60 & 61 Vict. c. 37, s. 7, subs. 2, schedule I., par. 1 (a) (*Williams v. The Ocean Coal Co. Ltd.*, [1907] 2 K. B. 422; 23 T. L. R. 584); will, pending its birth, not lose its rights by reason of subsisting litigation (see Rules of Supreme Court, Order XVII. r. 4, and *Peter v. Thomas-Peter*, 1884, 26 Ch. D. 181; 59 L. J. Ch. 515; 50 L. T. 176; 32 W. R. 515); and in many respects it will be considered *in esse* for its benefit, but not for its prejudice (*Wallis v. Hodson*, 1740, 2 Atk. 114; 26 E. R. 472; *Burnet v. Mann*, 1748, 1 Ves. 156; 27 E. R. 953; *Lancashire v. Lancashire*, 1792, 5 T. R. 49; 2 R. R. 535; *Doe v. Clarke*, 1795, 2 Black. (H.) 399; 3 R. R. 430; *Woodford v. Thellusson*, 1798, 4 Ves. Jun. 321; 31 E. R. 117; 4 R. R. 205; see also the cases cited under EN VENTRE SA MERE). In *Lancashire v. Lancashire*, Keynon, C.J., said that the true principle was to be found in the words of Vinnius, "*Fictione juris nativitas retrotrahitur*" (Vin. lib. 2, tit. 13), and both in *Doe v. Clarke*, and *Woodford v. Thellusson*, Buller, J., used language of the same unqualified character. The principle is too strongly stated in these cases; and criticising them, Page-Wood, V.-C., says that it is untrue to say that "for all purposes" a child *en ventre sa mère* may be considered as already born (*Richards v. Richards*, 1860, John. 754; 70 E. R. 623). One main qualification of that principle, as Page-Wood, V.-C. pointed out, is to be found in the rule as to mesne profits, which was long ago stated thus:—

"If a man seised of lands in fee hath issue a daughter and dieth, his wife being *ensient* with a son, the daughter soweth the ground, the sonne is borne, yet the daughter shall have the corne, because her estate was lawful, and defeated by the act of God, and it is good for the commonwealth that the ground be sowne."

Thus Coke upon Litt. 55*b*, the reference there given being 15 Hen. VI.

c. 6 (1437, not in the *Y.-B.*, nor in *Harl. MSS.* No. 4557). The doctrine stated is undoubtedly sound, whatever may be thought of the second and third reasons by which Coke supports it. Upon a descent, when the widow is left *ensient*, the freehold, pending the birth of her child, vests in the presumptive, or, to use Page-Wood, V.-C.'s, better description (in *Richards v. Richards*, *ut infra cit.*), "the qualified," heir, whose estate, so vested for the meantime, is liable hereafter to be divested in favour of the posthumous heir. For the common law will not, except in certain special cases, brook any vacancy, any abeyance, of the freehold; and therefore when an estate is to arise upon such a contingency as the birth of a posthumous child, the freehold must, for "no other end than to keep the feud always full" (Page-Wood, V.-C., in *Richards v. Richards*), vest in some person for the meantime until the contingency happens; that person, whoever he is, has the right to the mesne profits. There were services to be discharged: those services he who was in possession must discharge; it was but bare justice that he who had to discharge the services should receive the profits arising from the lands whose duties it fell to him to discharge. This doctrine, said by Page-Wood, V.-C., to be "of the strictest common-law character," is well stated in Hargrave and Butler's notes to Co. Litt. (1832 ed., 11*b*, note 59, and 55*b*, note 369) and in Watkins on *Descent* (1st ed., p. 185). Babington, C.J., in 1430 (*Year-Book*, Trin. Term, 9 Hen. vi., fol. 25*a*), laid down this principle, and his authority was cited in its support by De Grey, C.J., in *Goodtitle v. Newman*, 1774 (3 Wils. 516). Lord Hardwicke, L.C., in *Basset v. Basset*, 1744 (3 Atk. 202; 26 E. R. 918), took it for granted that a posthumous child was entitled to the rents and profits of a descended estate from the date of birth only. Until recently the contention has from time to time been raised that this rule applied only to mesne profits already received, and that the "qualified heir" could not claim rents accrued due, but not actually paid, before the birth of the posthumous child. But Page-Wood, V.-C., in *Richards v. Richards*, 1860, John. 754; 70 E. R. 623, declined to follow Vice-Chancellor Stuart's decision in *Goodale v. Gawthorne* (1854, 2 Sm. & G. 375; 65 E. R. 443), and held that a posthumous heir is entitled to the rents of a descended estate only from the date of his birth, whether the prior rents have been received or not. And in the case of *In re Mowlem*, 1874, L. R. 18 Eq. p. 9, where there had been a devise to trustees to the use of the first and other sons in tail male, with a residuary devise, and three months after the testator's death the first son of plaintiff was born, Jessel, M.R., following *Richards v. Richards* in preference to *Goodale v. Gawthorne*, held the residuary devisees entitled to the intermediate rents.

The strict common-law principle, just described, does not hold good where the mesne profits are otherwise disposed of by express provision of the parties, as in the case of trustees to preserve contingent remainders, who receive, as a rule, directions in what way they are to apply the rents which come into their hands. But where the estate vested by purchase, and there were no trustees to preserve contingent remainders for posthumous children, the hardship might possibly occur—until a statute was made to prevent it—of a posthumous heir being under such circumstances for ever prevented from enjoying his father's estate, "according to the maxim of the common law, that an estate by purchase must vest *eo instanti* that the last estate determines" (Hardwicke, L.C., in *Millar v. Turner*, 1747-48, 1 Ves. 85; 27 E. R. 907, and in *Robinson v. Robinson*, 1750-51, 2 Ves. 225; 28 E. R. 146). Such a hardship would have hap-

pened but for the House of Lords in "*Reeve v. Long*, in King William's time" (1694, 3 Lev. 408; 83 E. R. 754); Lord Hardwicke mentions it (see the cases just cited), and says that it was as a result of *Reeve v. Long* that the Statute 10 & 11 Will. III. (1699) c. 16, was passed. This statute preserves contingent remainders for a posthumous child where there are no trustees for that purpose, and gives such a child the estate in the same manner as if he were born in the father's lifetime, "and is therefore construed to carry the profits from the father's death" (Co. Litt. 55*b*, note 369). *Basset v. Basset*, 1744, 3 Atk. 202; 26 E. R. 918, is a decision of Lord Hardwicke upon this statute (cp. *Green v. Ekins*, 1742, 2 Atk. 473; 26 E. R. 685). The case of personalty is different from that of real estate, "for the right to that may be in suspense, and generally during the time it continues so the profits accumulate till the vesting of the capital happens, and that are added to that, and belong to the same person" (Co. Litt. 55*b*, note 369; see *Green v. Ekins*, *ut supra cit.*; *Studholme v. Hodgson*, 1734, P. Wms. 300; 24 E. R. 1074; *Fearne, Contingent Remainders*).

The word *devest*, so often occurring in this connection, is invariably used in the form here given by reporters until far into this century, and by Hargrave in his notes to Co. Litt.; the most recent usage would appear to favour the form *divest* (see *Foxwell v. Van Grutten*, [1897] A. C., at p. 694).

It is necessary to restate, in the light of the case of *Villar v. Gilbey*, [1905] 2 Ch. 301; [1906] 1 Ch. 583; [1907] A. C. 139; 21 T. L. R. 561; 22 *ibid.* 347; 23 *ibid.* 392; 74 L. J. Ch. 529; 75 *ibid.* 308; 76 *ibid.* 339; the principle upon which for some purposes a child is treated as having been "born," when at the happening of a given event it is in fact only *en ventre sa mère*. The earlier cases are reviewed in *Villar v. Gilbey*. They fall into four classes, according to Lord Atkinson, who adopted the classification suggested by counsel: First, there are those dealing with the interpretation of wills; in these, owing to the special character of the Ecclesiastical Courts and the influence therein of the civil law, the rule *posthumus pro nato habetur* was allowed full scope, as, for example, in the interpretation of the Statute of Distributions (see *Edwards v. Freeman*, 1727, 2 P. Wms. 441; 24 E. R. 803; *Wallis v. Hodson*, 1740, 2 Atk. 114; 26 E. R. 472; *Doe v. Lancashire*, 1792, 5 T. R. 49; 2 R. R. 535). The second class consists of those dealing with the words "life in being" in the rule against perpetuities; the rule, as laid down in *Cadell v. Palmer*, 1833, 1 Cl. & F. 372; 6 E. R. 956; 36 R. R. 128; and *Thellusson v. Woodford*, 1798, 4 Ves. Jun. 321; 31 E. R. 117; 4 R. R. 205, allows the period of gestation to be added at both ends of the period of twenty-one years. The third class deals with the formula, "children living at such and such a time," and it was held, in construing will or marriage articles, a child *en ventre sa mère* was "living" for this purpose. The fourth class consists of three cases—*Trower v. Butts*, 1823, 1 S. & S. 181; 57 E. R. 72; 24 R. R. 164; *Blasson v. Blasson*, 1864, 33 L. J. 4 Ch. 403; 2 De G., J. & S. 665; 46 E. R. 534; and *Pearce v. Carrington*, 1873, L. R. 8 Ch. 969, in all which the word to be interpreted was "born." In the first of these Sir John Leach held that a child *en ventre sa mère* was "within the reason and the motive of the gift." Westbury, C., in the second case, restated the rule thus: "That the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which if born it would be entitled to, and that it is limited to cases where *de commodis*

ipsius partus quæritur." The third case followed this principle, as laid down above by Lord Westbury. The House of Lords, in *Villar v. Gilbey*, has affirmed the same principle, pointing out clearly that it is a rule of narrow, not general, application for the interpretation of the word "born" to the advantage of posthumous offspring, and can never be invoked except for the benefit of an after-born child—within that limit the rule will be liberally interpreted for that purpose; as appears by the more recent case *In re Salaman de Pass v. Sonnenthal*, 1907, 2 Ch. 46, and 1908, 1 Ch. 4, where the Court of Appeal, reversing Kekewich, J., decided that the words "born previously to the date to this my will" apply to a child then *en ventre sa mère*.

With regard to the making provision, whether by deed or will, for posthumous children, no difficulty can arise so long as the offspring intended to be benefited are to be legitimate; their case is amply covered, even without specific mention, by the principle of *Hale v. Hale*, 1692, Prec. in Ch. 50; 24 E. R. 25; of *Burnet v. Mann*, 1748, 1 Ves. 156; 27 E. R. 953; of *Blasson v. Blasson*, 1864, 2 De G., J. & S. 665; 46 E. R. 534; they are "children;" they are deemed to be "living at the death" of their fathers, and so on. The difficulty arises when provision is sought to be made for illegitimates not yet born. There are several obstacles: illegitimate offspring are, as a rule, not "children;" and though this obstacle may be easily surmounted in the case of children already born, if they be described strictly with respect to their mother, or have acquired the name and the reputation of "children," there is the further difficulty of avoiding the violation of the rule which forbids anything tending to the encouragement of vice. The contemplation of future illicit intercourse is utterly fatal to the validity of such provision, if made by deed; but as a will speaks from the testator's death, there is a slight possibility of making provision in that way for a bastard unborn, but the possibility is very limited. An early case is *Blodwell v. Edwards*, 1597, Cro. Eliz. 509; 78 E. R. 758. In *Metham v. Duke of Devon*, 1718 (1 P. Wms. 529; 24 E. R. 502), it was said: "Nay, the child *en ventre sa mère* shall not take," in the case of a remainder, where there was no uncertainty of description (see Co. Litt. 3*b*; Hargrave's notes, 1). *Earle v. Wilson* (1811, 17 Ves. 528; 34 E. R. 202; 11 R. R. 130), laid down the rule that a bastard cannot take as the issue of a particular person until it has acquired the reputation of being the child of that person, which cannot be before its birth; in that case the testator sought to provide for such children of a particular woman "as she may happen to be *ensient* of by me" at the time of his death. The most recent cases are: *Crook v. Hill*, 1873, L. R. 6 H. L. 265; *Occleston v. Fullalove*, 1873, L. R. 9 Ch. 147, where Lord Selborne (who dissented) was in favour of applying to the case of provision by will the same rigid rule which is enforced in the case of gifts by deed; *In re Hastie's Trusts*, 1887, 35 Ch. D. 728, see esp. 733; *Thompson v. Thomas*, 1891, L. R. Ir. 27 Ch. 457. Hargrave has a valuable note at Co. Litt. 3*b* (1), and seems to think that in his day (*circa* 1780) the extent to which the doctrine of the policy of the law in favour of marriage to the prejudice of bastards goes was unsettled. Uncertainty of description, as he points out, is avoided by describing the child strictly in reference to the mother only. There seems, then, a possibility of providing by will for a posthumous child if it be described by reference to its mother only; and even by deed, if the child at the time be already *en ventre sa mère*. But the important dissent of Lord Selborne in *Occleston v. Fullalove* leaves the

subject in some doubt, as Stirling, J., recognised in *In re Hastie's Trusts*, *supra cit.*

The rule which governs the descent of lands in fee extends to copyholds also: the presumptive or qualified heir will be admitted till the contingency—the birth of the posthumous child—happen (Watkins, *Descents*, p. 172; Watkins, *Copyholds*, vol. i. c. v.).

As to borough-English, Watkins says: "If a person die seised of borough-English lands, leaving a son born and another *en ventre sa mère*, the posthumous son shall enter upon his brother, as appears the better opinion" (Watkins, *Copyholds*, vol. ii. c. ii. p. 54; Watkins, *Descents*, c. iv.; Robinson, *Gavelkind*, 5th ed., pp. 246, 247).

The effect of the birth of a posthumous child, whether of the *bastard eigne* or of the *mulier puisne* (in the case where the former has entered and died seised), is stated by Watkins, *Descents*, c. iv. The rule followed strictly the old law of descents. Watkins questions now whether "the liberality of the times" would not consider such issue as much born for the purpose of making a descent in this instance as in any other (Watkins, *Descents*, p. 184, with his references); moreover, he intimates his opinion (p. 3, *note*), that 3 & 4 Will. iv. c. 27 (The Real Property Limitation Act, 1833), by sect. 39, which provides that "no descent cast" (after the 31st December 1833) "shall toll or defeat any right of entry or action for the recovery of land," made a final end of the case of the *bastard eigne* and the *mulier puisne*.

With regard to the succession to a peerage (see *sub voce* BARONY), the general rule which regulates the descent of real estate is followed. The posthumous child would on birth succeed to the title. The "qualified" (or presumptive) heir will be entitled to the honour in the meantime. But the practice is for the heir-presumptive not to apply for the writ of summons (nor to assume the title) in cases where there is the probability of a posthumous child. Cruise (*Origin and Nature of Dignities*, pp. 201, 202) states that anciently there was a theory that if, on the death of a peer, his barony in fee is suspended, and falls in abeyance between his daughters as co-heiresses, his posthumous son is not entitled of right to the peerage; "the son will be a baron, but at the King's pleasure, because the title was once suspended;" though this view could plead some authority, the contrary seems to be now settled law (*In re The Barony of Willoughby de Broke*, 1694, in *Precedents collected by King, Lancaster Herald, Chief Baron Ward's Collection*; see also Collins's *Proceedings, Precedents, and Arguments on Claims and Controversies concerning Baronies by Writ and other Honours*, 1734, pp. 224, 225, 322-331; *Reports from the Lords' Committees touching the Dignity of a Peer of the Realm*, 1822, vol. ii. p. 179).

Two very curious questions in respect of posthumous children are raised by Coke.

He instances at 29*b*, notes (Co. Litt.), the case of a child posthumous in respect of its mother. His words are:—

"If a woman seised of lands in fee taketh husband, and by him is bigge with childe, and in her travell dyeth, and the childe is ripped out of her body alive, yet shall he not be tenant by the curtesie, because the childe was not borne during the marriage, nor in the life of the wife, but in the meantime her land descended, and in pleading he must allege that he had issue during the marriage."

His reference is to *Paine's Case*, 1587, in his own reports (8 Co. Rep. vol. iv. fol. 34; 77 E. R. 524), where one *Reppes's Case* (*temp. Phil. & Mary*) is cited on Lord Dyer's authority.

The subject has attracted the attention of the writers on medical jurisprudence (Taylor, vol. ii. p. 220; Tidy, vol. ii. pp. 245, 246). But the rule of *curtesy of England*, whether as stated by the ancient writers Bracton (lib. v. c. xxx. fols. 437, 438) and Littleton (1 *Inst. c. iv. s. 35*; Co. Litt. 29*a*), or in modern text-books (Williams, *Real Property*, 16th ed., pp. 266, 268), says nothing about the wife being alive; to give the benefit of tenancy by the curtesy, the issue must have been born alive, and, secondly, must have been capable of inheriting as heir of the wife. If a posthumous child is to be deemed *in esse* for the purpose of inheriting from its father, it is hard to see why it should not equally be *in esse* for the purpose of succeeding its mother; the difficulty as to the land descending is not greater in the latter case than in the former (*cp.* Domat, bk. ii. tit. 1, s. 1, par. 6).

The second remarkable statement of Coke (Co. Litt. 8*a*, note *g*) is this:—

“If a man hath a wife, and dyeth, and within a very short time after the wife marrieth againe, and within 9 months hath a childe, so as it may be the childe of the one or the other, some have said, that in this case the childe may choose his father, *quia in hoc casu filiatio non potest probari*, and so is the booke to be intended; for avoiding of which question and other inconveniences, this was the law before the Conquest: *Sit omnis vidua sine marito duodecim mensibus, et si maritaverit perdat dotem.*”

Blackstone (vol. i. p. 457) lays down the same principle, and adds the curious detail that a person born under such circumstances “is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases.” Brooke (*Abr.*, “Bastardy,” pl. 18) throws doubt upon this doctrine (Co. Litt. 8*a*, note 7); and the fact that there are instances of the question of such a person’s legitimacy being tried by the Courts renders it unlikely that the principle stated by Coke is law (see *Alsop v. Bowtrell*, 1620, Cro. (3) 541; 79 E. R. 464; *Thecar’s Case*, 1624, Cro. (3) 686; 79 E. R. 595; and other cases cited in Hargrave’s note 190 to Co. Litt. 123*b*). Such a question would now be tried as an issue of fact, subject to the rules of evidence which obtain in cases of legitimacy (see LEGITIMACY). Coke’s attempt (Co. Litt. 123*b*, note *f*) to make it a hard-and-fast rule, a *presumptio juris et de jure*, in such cases, that forty weeks is the extreme *legitimum tempus pariendi*, is criticised by Hargrave (note 190*), and shown to be based upon a misreading of *Radwell’s Case* (1290), therein cited. The fact of the indecent haste of the second marriage would be a material circumstance to consider in determining the paternity of a child born under such circumstances. Stephen, J., however, in his *Law of Evidence* (Art. 98, note), suggests the case of a soldier dying in service in India, and leaving his wife a widow in the camp; the regimental rules compel the widow to leave the station in a limited time, unless she marry again; consequently, a short widowhood is often followed by a second marriage to a soldier within the prescribed period.

It is possible to imagine an actual case in which a person answering to the description given by Coke might practically have the power to exercise the choice attributed to him as his right by Coke and Blackstone; the evidence in favour of the paternity of the one husband might be nicely balanced against that in favour of the other; it might happen that if he could prove himself the issue of the one, he would be entitled to an estate; by claiming the estate, he would affirm that one

his father, and if the evidence were no weaker in support of that contention than that in support of the alternative theory, it is difficult to believe that his claim would not prevail. To prevent such questions arising, the civil law (*Cod.* 5, 9, 2) forbade widows to remarry *infra annum luctus* (see also, on this subject, Domat, bk. ii. tit. 1, s. 1, par. 5).

The danger of supposititious posthumous children being palmed off by widows as the lawful offspring of their husbands was early recognised by the English law, which "for the benefit and safety of right heirs *contra partus suppositos*," says Lord Coke (*Co. Litt.* 8*b*), "hath provided remedie by the writ *de ventre inspiciendo*" (see *DE VENTRE INSPICIENDO*). The form of the writ is in the *Register* (227*a*); an early example is the case of *Johanna de Aldham* (1219-1220, *Rot. Lit. Cl.* 4 Hen. III.; Duffus Hardy, *Cl. Roll.* vol. i. p. 435*b*). Other early cases are in Henry of Bracton's *Note-Book* (Nos. 128, 137, 198, 1503, 1605). The nature of the proceedings is well known. The *verus hæres* (or other person claiming an interest liable to be defeated by the birth of a posthumous child) sued for the writ from the Chancery; the procedure is by way of petition (*per* Kenyon, M.R., in *Ex parte Bellett*, 1786, 1 Cox C. C. 297; 2 Dick. 781). The writ was directed to the sheriff, who had to make his inquiry by *legales et discretos milites, et legales et discretas mulieres*, twelve of each. He made his return into the Common Pleas; if the woman was found with child, a second writ issued from the Common Pleas to the sheriff for her safe custody; this writ King, L.C., called "*the material writ*" (*Ex parte Aiscough, Lady Chaplin's Case*, 1730, Mos. 391; 25 E. R. 458; 2 P. Wms. p. 591; 24 E. R. 873). The other cases are collected in *MATRONS, JURY OF*. The general effect is to show that the remedy is in the nature of a writ of right (*per* King, Ld., *Ex parte Aiscough*); that no *prima facie* case of fraud is necessary to obtain it (*Mrs. Ann Fox's Case*, 1835); that it will be granted to protect any kind of interest (*e.g.* Jekyll, M.R., in *A.-G. v. La Roche*, 1725, cited in *Ex parte Aiscough*, Mos. 392; 25 E. R. 458, granted it for the protection of a charity); and at the suit of any person who has a real, not merely a prospective, interest. It will be granted even though the woman have a husband living (*Thecar's Case*, 1623, 3 Cro. (2) p. 686; Win. 71: *Ex parte Wallup, In re Brown*, 1792, 4 Bro. C. C. 90; 29 E. R. 794; 2 Dick. 767; 21 E. R. 469); though in the former case the Court laid it down that the woman ought not to be separated from her husband, and modified the procedure accordingly. The most recent cases are *Ex parte Marston, In re Mrs. Ann Fox*, 1835 (*The Times*, July 1, July 6, August 6, 1835; *London Medical Gazette*, 1835, vol. xvi. p. 697, "Some Late Proceedings in Chancery: *De Ventre Inspiciendo*," and vol. xvii. p. 191, "Issue of the *De Ventre Inspiciendo Case*;" and *In re Blakemore*, 1845, 14 L. J. Ch. 336. These cases amply illustrate the principles upon which the writ is granted and also the means which the Courts have consistently employed in order to temper the rigour of the process with humanity and with regard to decency and good feeling. Hargrave (*Co. Litt.* 8*b*, note 44, and 123*b*, note 190) discusses the subject; and the remarkable case of *Salisbury v. Rawson*, 1895 (see *The Times*, May 24 and August 8, 1895), shows that the fraud aimed at by the process is no imaginary danger and that without some safeguard it may be attempted and carried on for a time with some success; in that case, no petition for the writ *de ventre inspiciendo* was presented.

[*Authorities*.—Fleta; Bracton, v. fols. 437, 438; Bracton's *Note-*

Book; Britton; Coke, Litt.; Blackstone, *Com.* vol. i. p. 456, and vol. ii. p. 169; Cruise, *Digest*, vol. iii. p. 320; Swinburne, *Wills*, pt. iv. s. 15; Watkins, *Descent*, c. iv. "On the Entry of a Posthumous Heir;" Jarman, *Wills*; Vaughan-Hawkins on *Wills*, 1863, p. 79; Powell, *Devises*; Fearne, *Contingent Remainders*; Weightman, *Legitimacy*; Taylor, 1894, *Medical Jurisprudence*, vol. ii. pp. 159, 160, and 238; Tidy, *Legal Medicine*, vol. ii. pp. 108, 109, and 245, 246; Le Marchant's edition (1828) of the *Gardner Peerage Case*, preface, p. xl.]

Postliminium.—A term of the Roman law derived from *post* and *limes* (a boundary). When a Roman citizen was taken prisoner of war he suffered *maxima capitis diminutio*, and lost his status as a free man, and but for the operation of the *jus postliminium*, his descendants would have ceased to be in his *potestas*. If he returned from captivity, by the fiction of *postliminium* he was deemed never to have been in captivity, and therefore was entitled to enjoy all rights which accrued to him during his captivity. By the *lex cornelia* (B. C. 81) the fiction of *postliminium* was extended to the extent that, if a captive died during his captivity, his death dated from the time of his capture, so that he died free although he lived a captive. *Postliminium*, as applied to persons, has ceased to have any practical effect; but in this connection the following provisions of the Army Act, 44 & 45 Vict. c. 58, may be noticed (s. 138):—

"The following penal deductions may be made from the ordinary pay due to a soldier (*i.e.* all below the rank of commissioned officer, s. 190 (6)) of the regular forces:

"(1) All ordinary pay for every day of absence . . . as a prisoner of war."

Sec. 137 enumerates the penal deductions in the case of commissioned officers, but does not mention time as a prisoner of war.

By the King's Regulations for the Navy (1670), all officers, seamen, marines, and boys are entitled to their pay while prisoners of war.

Postliminium, as applied to property taken in war, remains in operation to the present time, and the following reason is given by writers on international law for its retention:—"That fellow-countrymen may not thrive on the misfortunes of each other."

Originally it was held that a recapture must be effected within twenty-four hours for the doctrine of *postliminium* to apply. But the modern doctrine is that the period of application as regards land capture is twenty-four hours, but as regards maritime captures, until condemnation by a prize Court properly constituted and sitting in the dominions of the Government of the captor or its ally.

In England, *postliminium* is regulated by the Statute 27 & 28 Vict. c. 25 (the Naval Prize Act, 1864), ss. 40, 41, by which British ships or goods recaptured from the enemy by any of His Majesty's ships are to be restored to the owner by a decree of the prize Court, on his paying as prize salvage one-eighth part of the estimated value, or in special cases not more than one-fourth part of the value.

Provided that where a ship so taken is set forth or used by any of His Majesty's enemies as a ship of war, the provision for restitution shall not apply.

If a neutral ship be captured by a belligerent either for attempting to run a blockade or for conveying contraband of war to a port of the

other belligerent, and should thereafter be recaptured by the other belligerent, the doctrine of *postliminium* would apparently not strictly apply: but the practice of the English Admiralty Courts during the great naval war with France, was to release the recaptured vessel on the payment of prize salvage. If, however, the neutral vessel recaptured was not liable to condemnation, she is entitled to be released by the recaptor without detention or claim for salvage (*Lushington, Manual of Naval Prize Law*, par. 293; Lord Stowell in his judgment in the *War Onskau*, 2 Rob. C. 300).

Post litem motam.—See LIS MOTA.

Postmaster-General.—See POST OFFICE; TELEGRAPH; TELEPHONE.

Post-Mortem.—See CORONER, Vol. III., at p. 695; MEDICAL JURISPRUDENCE, Vol. IX., at p. 168; TOXICOLOGY.

Post-Natus.—See ANTE-NATUS; BASTARD; LEGITIMACY.

Post-note, a bank-note, intended to be transmitted to a distant place by the public mail, and made payable to order; differing in this from a common bank-note, which is payable to the bearer.

Post-nuptial Settlement.—See HUSBAND AND WIFE; SETTLEMENTS.

Post-obit.—A post-obit bond is a bond, usually a money bond, conditional for payment on, or at a fixed date after the death of a person named, and generally a person from whom the obligor has expectations. Many of the obligations set aside as CATCHING BARGAINS (Vol. II. p. 594), especially in the older cases, have been of this character, and the Court looks at such bonds, when made by an “expectant heir” in favour of a money-lender, with grave suspicion (*Lushington v. Walker*, 1788, 1 Black. (H.) 95; *Cooke v. Lamotte*, 1851, 15 Beav. 234; 51 E. R. 527; 92 R. R. 397; *Tottenham v. Green*, 1863, 32 L. J. Ch. 201). In *Hawker v. Hallewell*, 1855, 25 L. J. Ch. 558, however, the Court refused to set aside such a bond upon an allegation supported by the debtor’s evidence only, that the debt was a gambling transaction.

A creditor under a voluntary post-obit bond is entitled, as any other creditor, to the benefit of the Statute 13 Eliz. c. 5, against a fraudulent settlement by the obligor (*Adames v. Hallett*, 1868, L. R. 6 Eq. 468).

Post Office (The).

TABLE OF CONTENTS.

I. HISTORY	343	III. OFFENCES AGAINST THE POST OFFICE LAWS	351
II. THE MONOPOLY AND INCIDENTAL MATTERS	346		

I. HISTORY.

The history of the Post Office in the United Kingdom presents some interesting facts relative to the evolution of the State monopoly, which may properly receive preliminary notice in this article.

In the earliest times in England letters were conveyed by special messengers. Henry I. and his nobility instituted regular messengers (*nuncii*), who travelled on horses supplied by their employers.

In the time of Edward II. fixed stations, or *posts*, were established, at which horses were kept for hire, and the term "post" was consequently applied to the *nuncii* "riding post," who changed their horses at such places; a common inscription on letters of the period being "Haste, post, haste, for thy life!" When common carriers began (*temp.* Henry VI.) to ply regularly with pack-horses, they were also employed to convey letters.

In 1481 Edward IV., being then at war with Scotland, established a system of posts along the north road, consisting of a series of stations twenty miles apart. Henry VIII. instituted the office of "Master of the Posts," whose expenditure was called "post money." By an Act of Edward VI. a uniform charge for the hire of post horses was fixed.

In Elizabeth's reign the system of posts was greatly extended throughout the kingdom; and foreign correspondence, which had hitherto been left to the management of alien merchants resident in London, was placed under the jurisdiction of the Master of the Posts, whose title was thereupon changed to "Chief Postmaster." Under James I. the right of the Crown to have the use of post-horses in priority to subjects was asserted and exercised.

In 1635 (Car. I.) an extensive scheme of inland posts on the main roads throughout England, and extending to Edinburgh, was proposed by the then "Postmaster-General for Foreign Parts" (Thomas Witherings), and established by proclamation, which contained the prohibition that "no other messengers . . . shall take up, carry, receive, or deliver any letter . . . other than the messengers appointed by the said Thomas Witherings," with certain exceptions therein stated. The principle of State monopoly in the conveyance of letters thus inaugurated has since been invariably maintained, and gradually extended to all kinds and methods of correspondence. The parliamentary party vigorously opposed this exercise of royal prerogative, but when they assumed the responsibilities of government they speedily realised the practical advantages it afforded, and resolved that the monopoly should be exercised by Parliament. Consequently when, in 1649, the Common Council of London established a rival system of posts, the scheme was frustrated by statute (1656). Thenceforth the Post Office became the subject of systematic legislation, under which the management of the Post Office, as it now exists, has been gradually developed.

At the Restoration the monopoly thus adopted by the Commonwealth was confirmed by Statute 12 Car. II. c. 35 (sometimes called the Post Office Charter), which re-enacted not only the exclusive privilege as to letters, but also declared the monopoly of providing horses for persons "riding in post," with penalties for infringement. In 1682 another attempt to break the monopoly was made by establishing a local "penny post" in London, it being contended that such service was within the statutory exceptions, but the Court of King's Bench declared the scheme illegal (*Docwra's Case*, Skin. p. 84). But this induced the establishment of a special postal service for London at a uniform rate of postage ("the Twopenny Post"). Queen Anne's reign witnessed another attempt to establish a rival post in London ("the Halfpenny Post"), with a similar result (*Povey's Case*, 8 Anne). In 1710 a general Post Office Act, 9 Anne, c. 10, was passed, which consolidated the previous statutes, and brought

the postal service of the colonies within the control of the Postmaster-General. In 1778 the Postmaster-General's monopoly of providing post-horses was abolished by Act 19 Geo. III. c. 51, which substituted post-horse licences and other duties under the Inland Revenue. In 1784 mails were for the first time conveyed in England by mail coaches, then recently invented. In the same year the Irish Parliament created an independent Postmaster-General for Ireland, but on the accession of Her late Majesty in 1837 a series of statutes re-established one Postmaster-General for the whole of Her Majesty's dominions, and defined his privileges, powers, and duties (1 Vict. cc. 32, 33, 34, 35, 36).

The various successive developments of the Post Office system during the reign of Queen Victoria are remarkable.

In 1838 legislative provision was made for the conveyance of mails on railways, and that method of conveyance, which greatly facilitated the introduction of the penny postage system, has been from time to time extended by subsequent statutes, and now includes tramways and tramroads (56 & 57 Vict. c. 38). In 1839 an Act was passed temporarily providing a uniform rate of postage for letters, and abolishing the much abused privilege of "franking." The year 1840 brought the complete accomplishment of the "penny postage" scheme throughout the United Kingdom, which was authorised by Statute 3 & 4 Vict. c. 96, and effected a revolution in Post Office work. Numerous subsequent Acts have greatly extended the services rendered by the department in respect of newspapers, book-packets, pattern and sample packets, post-cards, and other subjects of postal traffic. The development of the general system may be said to have culminated in the addition of the *Parcel Post* in 1882, under the Act 44 & 45 Vict. c. 74, which contains detailed arrangements between the department and the railway companies throughout the United Kingdom for carrying out this important scheme. The duties of railway companies under that Act in respect of receiving, delivering, and transferring parcel mails at their stations have been judicially considered and defined (*R. v. L. & N.-W. Ry. Co.*, 1896, 65 L. J. Q. B. 516). All differences as to remuneration for the conveyance of mails by railway or tramway are now determined by the Railway Commission (56 & 57 Vict. c. 38).

By the Act of 1840, s. 38, the public also become entitled "to remit small sums of money through the post by means of *money orders*." This privilege was developed by the Money Order Act, 1848, 11 & 12 Vict. c. 88, and was subsequently extended by the creation of "Postal Orders" in 1880 and 1883 (43 & 44 Vict. c. 33, and 46 & 47 Vict. c. 58, and 3 Edw. VII. c. 12). In 1892 telegraph money orders were authorised by regulations (*London Gazette*, March 11, 1892). Under these Acts and regulations "money orders" and "postal orders" are now issued between the United Kingdom and British possessions and other places abroad. See POST OFFICE ORDERS.

The Post Office *Savings Bank* "for depositing small savings at interest with the security of the Government" was instituted in 1861, by Act 24 Vict. c. 14; and further Acts for this purpose were passed in 1869, 1874, 1880, 1882, and 1893, by virtue whereof depositors are enabled within certain prescribed limits as to amount, etc., to invest in Government funds, and to effect insurances and purchase annuities.

In 1868 the long-existing public agitation for bringing under the control of the Post Office the working of *telegraphs* throughout the United Kingdom resulted in the passing of the Telegraph Act, 1868,

31 & 32 Vict. c. 110, "to enable H.M. Postmaster-General to acquire, work, and maintain electric telegraphs in connection with the administration of the Post Office," giving him voluntary powers for purchasing existing undertakings, and imposing a uniform rate of charge for transmission throughout the United Kingdom, which rate was subsequently reduced by Act in 1885. That measure was followed by the Telegraph Act, 1869, conferring a monopoly on the Postmaster-General in respect of the transmission of telegrams, coextensive with his monopoly of the conveyance of letters, and conferring compulsory powers for acquiring all existing undertakings. In 1870 the transfer, so authorised, of telegraphic business theretofore carried on by the several companies established under the General Telegraph Act, 1863, was effected, and the system was extended to include the Channel Islands and Isle of Man (Telegraph Act, 22 Vict. c. 88). By the Telegraph Act, 1878, 41 & 42 Vict. c. 76, further powers to establish telegraphic lines were conferred on the Postmaster-General, with various protective provisions hereafter referred to. And, finally, by the Telegraph Act, 1892, 55 & 56 Vict. c. 59, the Post Office is empowered to develop "that part of the telegraphic system of the United Kingdom called the telephonic system," by purchasing and working trunk lines in connection with the exchange systems of certain licensee companies located in the chief business centres of the kingdom. See TELEGRAPH; TELEPHONE.

Before proceeding to consider, in the next place, the extent and consequences of the Post Office monopoly, it will be useful to observe that the statutory definition of the term "*post letter*" has been from time to time amended and extended by successive enactments, as required by the development of the departmental service, and is now synonymous with "postal packet," which means (P. O. Act, 1875, s. 10) "a letter, postcard, newspaper, book-packet, pattern or sample packet, circular, legal and commercial document, packet of photographs, and every packet or article which is not for the time being prohibited by or in pursuance of the Post Office Acts from being sent by post;" and inclusive of "such postal packets as are defined by regulations of the Treasury to be parcels," and also including telegrams (P. O. Act, 1884, s. 20). Such packet is to be deemed a post letter from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed, or at his house or office, according to the usual manner of such delivery (*ibid.*, s. 19).

II. THE MONOPOLY AND INCIDENTAL MATTERS.

The exclusive privilege of the Post Office in respect of letters is defined by Statute 1 Vict. c. 33 (the Post Office Management Act, 1837), sec. 2 whereof enacts—

"That Her Majesty's present Postmaster-General and the person or persons to be from time to time hereafter appointed by the Queen's Majesty by Letters Patent under the Great Seal of Great Britain shall be the Master of the Post Office by the style of Her Majesty's Postmaster-General and wheresoever within the United Kingdom and other Her Majesty's dominions posts or post communications are now or may be hereafter established the Postmaster-General by himself or by his deputies and their respective servants and agents shall have the exclusive privilege of conveying from one place to another all letters except in the following cases and shall also have the exclusive privilege of

performing all the incidental services of receiving collecting sending despatching and delivering all letters except in the following cases (that is to say):—

Letters sent by a private friend in his way journey or travel so as such letters be delivered by such friend to the party to whom they shall be directed.

Letters sent by a messenger on purpose concerning the private affairs of the sender or receiver thereof.

Commissions or returns thereof and affidavits and writs process or proceedings or returns thereof issuing out of the Courts of justice.

Letters sent out of the United Kingdom by a private vessel (not being a packet boat).

Letters of merchants owners of vessels of merchandise or the cargo or loading therein sent by such vessels of merchandise or by any person employed by such owners for the carriage of such letters according to their respective directions and delivered to the respective persons to whom they shall be directed without paying or receiving hire or reward advantage or profit for the same in anywise.

Letters concerning goods or merchandise sent by common known carriers to be delivered with the goods which such letters concern without hire or reward or other profit or advantage for receiving or delivering such letters.

But nothing herein contained shall authorise any person to make a collection of such excepted letters for the purpose of sending them in the manner hereby authorised.

And the following persons are expressly forbidden to carry a letter or to receive or collect or deliver a letter although they shall not receive hire or reward for the same (that is to say):—

Common known carriers their servants or agents except a letter concerning goods in their carts or waggons or on their pack-horses and owners drivers or guards of stage coaches.

Owners masters or commanders of ships vessels steamboats or boats called or being passage or packet boats sailing or passing coastwise or otherwise between ports or places within Great Britain or Ireland or between to or from a port or ports within Her Majesty's dominions or territories out of the United Kingdom or their servants or agents except in respect of letters of merchants owners of ships or goods on board.

Passengers or other persons on board any such ships vessels steamboat passage or packet boat.

The owners of or sailors watermen or others on board a ship vessel steamboat or other boat or barge passing or repassing on a river or navigable canal within the United Kingdom or other Her Majesty's dominions."

The exclusive privileges as to letters so conferred upon the Postmaster-General for the benefit of the public revenue are protected by correlative penal provisions contained in a contemporary Statute 1 Vict. c. 36 (the Post Office Offences Act, 1837), sec. 2 of which prescribes penalties against every person committing any of the following acts (with cumulative penalties for continued practices), viz.:—(1) Conveying otherwise than by the post a letter not exempted from the exclusive privilege of the Postmaster-General; or (2) performing otherwise than by the post any services incidental to conveying such letters from place to place; or (3) sending any such letter, or causing it to be sent or con-

veyed otherwise than by post; or (4) making a collection of exempted letters for the purpose of conveying or sending them otherwise than by the post, or by the post.

Some cases which have arisen and formed the subject of judicial decision under the above-mentioned enactments may conveniently be here noticed. In the year 1869 a company incorporated and registered under the Companies Act, 1862, for the delivery of circulars, the carriage of parcels, and other similar objects, was convicted under the Post Office Acts for conveying, otherwise than by post, a certain letter not exempted from the exclusive privilege of the Postmaster-General, and being in fact one of a large number of circulars which the company undertook to deliver to their respective addressees, at a certain rate of remuneration. And upon appeal to the Court of Queen's Bench on a case stated by the magistrate, the conviction was affirmed (*The Circular Delivery Co., Ltd. v. Clare*, 1869, 20 L. T. N. S. 701).

In 1886 an important question respecting the carriage of mails by sea arose between the Post Office and the Cunard Steamship Company, Ltd. The company, who were not at the time (as they previously had been) under contract for conveying mails, ventured to convey, by a particular vessel, from Liverpool to New York, letters collected by their agents in England, and addressed to consignees of goods shipped by that vessel. At the same time the company refused to convey by that vessel a ship letter mail which the Postmaster-General caused to be tendered to them for conveyance thereby, under the Post Office Act, 3 & 4 Vict. c. 96, s. 36. An English information by the Attorney-General was filed against the company, praying for a declaration of the rights of the Postmaster-General, and for an injunction, and ultimately (in May 1889) a decree was made accordingly.

The Telegraph Act, 1869, 32 & 33 Vict. c. 73, extended the exclusive privileges of the Postmaster-General in respect of letters to all telegrams transmitted within the United Kingdom. Sec. 3 of that Act declares that—The term "telegram" shall mean any message or other communication transmitted or intended for transmission by telegraph:

The term "telegraph" shall in addition to the meaning assigned to it in the Telegraph Act, 1863, mean and include any apparatus for transmitting messages or other communications by means of electric signals.

By sec. 4 it is enacted that—The Postmaster-General by himself or by his deputies and his and their respective servants and agents shall from and after the passing of this Act have the exclusive privilege of transmitting telegrams within the United Kingdom of Great Britain and Ireland except as hereinafter provided, and shall also within that Kingdom have the exclusive privilege of performing all the incidental services of receiving, collecting, or delivering telegrams, except as hereinafter provided.

Sec. 5. There shall be exempted from the said exclusive privileges of the Postmaster-General all telegrams of the following descriptions (that is to say)—Telegrams in respect of the transmission of which no charge is made transmitted by a telegraph maintained or used solely for private use and relating to the business or private affairs of the owner thereof.

Telegrams transmitted by a telegraph maintained for the private use of a corporation company or person and in respect of which or of the collection receipt and transmission or delivery of which no money

or valuable consideration shall be or be promised to be made or given. [As to the scope and effect of this and the preceding exception to the monopoly, see *Postmaster-General v. National Telephone Co. Ltd.*, [1907] 1 Ch. 621.]

Telegrams transmitted with the written licence or consent either special or general of the Postmaster-General under the hand of any officer of the Post Office authorised for that purpose by the Postmaster-General.

Telegrams transmitted by a telegraph company existing on the 22nd day of July 1869, the undertaking of which shall not for the time being have been acquired by the Postmaster-General.

Telegrams the transmission of which is authorised by the provisions of the Telegraph Act, 1868, or any agreement confirmed thereby or made or to be made in pursuance thereof.

Telegrams transmitted to or from any place out of the United Kingdom of Great Britain and Ireland.

Sec. 6 prescribes penalties for transmitting, or aiding or being concerned in transmitting, any telegram in contravention of the exclusive privilege conferred on the Postmaster-General by that Act, or receiving, collecting, or delivering any telegram in contravention of such exclusive privilege, or aiding, or being concerned in the receipt, collection, or delivery of such telegram, in contravention of such privilege.

Sec. 23 makes every telegram a "post letter" within the meaning of the Act 1 Vict. c. 36.

The invention of the telephone, and the formation of a public company (the Edison Telephone Company of London, Ltd.) to work that invention in the United Kingdom, raised in 1880 the important question whether their operations constituted an infringement of the Postmaster-General's exclusive privileges under the Telegraph Act, 1869. Upon the hearing of an English information filed by the Attorney-General against the company, praying for a declaration as to the rights of the Postmaster-General, and for an injunction, the Court gave judgment in favour of the informant on behalf of the Crown, and a decree for the relief prayed for was accordingly made (*A.-G. v. The Edison Telephone Co., Ltd.*, 1881, 6 Q. B. D. 244). In consequence of that decision the subsequent operations of that and other telephone companies have been conducted by virtue of formal licences granted by the Postmaster-General, in consideration of certain royalties and other prescribed conditions.

Other developments of telegraphy have given rise to similar questions in regard to the Postmaster-General's monopoly, and which, either in consequence of litigation or by arrangement, have been determined in favour of the public revenue. In 1891 two public companies which were incorporated for the purpose of working a system of telegraphs described as the "call system," were proceeded against upon information by the Attorney-General, and ultimately by arrangement in each case a decree was entered, restraining the defendant company from receiving and collecting messages by their telegraphs, and performing incidental services in connection therewith (*A.-G. v. Boys Messenger Co., Ltd.*, and *A.-G. v. District Messengers, etc., Co., Ltd.*, *Times*, April 15, 1891). The subsequent operations of those companies were consequently carried on under licence by the Postmaster-General.

Among the incidental privileges of the Post Office expressly con-

ferred by statute is the exemption from tolls on highways, etc. By sec. 19 of 1 Vict. c. 33, passed July 12, 1837, no tolls could thenceforth be demanded or taken on any turnpike road for horses and carriages employed in or about the conveyance of mails, "except where such horses or carriages were legally chargeable with toll" before that date. And by the contemporary Act, 1 Vict. c. 36, s. 9, penalties were prescribed against collectors of tolls at turnpike gates or bars on highways, bridges, post roads, and other places, who should demand tolls for mails, or obstruct or delay the passage of mails, and likewise against ferrymen committing similar acts. The practical effect of those enactments was the complete immunity of mails from tolls throughout the United Kingdom. In 1886 the Northam Bridge Company attempted by petition of right to obtain payment of tolls on mails passing over their bridge, but upon demurrer by the Attorney-General judgment was given in favour of the Crown (*Times*, November 24, 1886); *Northam Bridge Co. v. R.*, 55 L. T. 759. As to ferries, see *A.-G. v. Londonderry Bridge Commissioners*, [1903] 1 Ir. R. 389.

One of the most important consequences of the working of the Post Office by the State is that the Postmaster-General, as an officer of the Crown, is not legally responsible for the negligence or misconduct of his subordinate officers in the execution of their public duties, and for which wrongful acts those persons individually are alone responsible (*Lane v. Cotton*, 1 Salk. 17; *Whitfield v. Lord de Spenser*, Cowp. 765). The rigorous effects of this immunity as regards the loss of post letters and their contents, have to some extent been mitigated in recent years by Treasury regulations providing for the registration of postal packets, and allowing compensation to a limited amount in cases of registered packets containing valuable articles. It has been judicially decided that the Postmaster-General is not bound by a mistake made by a post office clerk in the amount of charge for the transmission of telegrams, and that the sender remains liable to the department for any deficiency between the sum actually paid and the proper authorised charge (*Postmaster-General v. Green*, 1887, 3 T. L. R. 780). And in 1906 the Court of Appeal held that the Postmaster-General is not liable in his official capacity as head of the Telegraphic Department of the Post Office for wrongful acts done by his subordinates in carrying on the business of the department (*Bainbridge v. The Postmaster-General*, [1906] 1 K. B. 178).

In respect of rights and liabilities *ex contractu*, the Postmaster-General is in the same position as other officers of the Crown contracting on behalf of His Majesty.

The Postmaster-General for the time being is by Act 3 & 4 Vict. c. 96, s. 67, constituted a body corporate "to hold and take conveyances and leases of messuages, tenements, lands, and hereditaments for the service of the Post Office." He is likewise empowered by Acts 26 & 27 Vict. c. 43, and 44 & 45 Vict. c. 20, with the consent of the Treasury, to sell and exchange lands. Moreover, compulsory powers of purchasing specific lands (under the provisions of the Lands Clauses Consolidation Acts) have from time to time been conferred upon him by several statutes, the latest of which is the Post Office (Sites) Act, 1907. Post office buildings, etc., are, like other Crown property, not liable to be rated and taxed by local authorities (*Smith v. Birmingham Guardians*, 1857, 7 El. & Bl. 483). Other property belonging to the Crown and used for Post Office purposes is similarly free from liabilities imposed by

statute, unless the contrary is expressly enacted, *e.g.* weights and measures used by a post office receiver (a person in trade) cannot be tested and condemned under the Weights and Measures Act, 1878, s. 25 (*R. v. Justices of Kent*, 1890, 24 Q. B. D. 181).

For the protection of persons acting in the execution of the Post Office Acts it is provided by sec. 46 of 1 Vict. c. 36, that all legal proceedings, whether by action or by prosecution, which shall be commenced against any person for anything done in pursuance of or under the Post Office Acts, shall be commenced and prosecuted within three calendar months next after the commission of the act, and not afterwards.

III. OFFENCES AGAINST THE POST OFFICE LAWS.

(a) *Offences punishable on summary conviction* by penalties or fines recoverable by distress, and in default imprisonment :—

Any person conveying or sending otherwise than by post, or causing to be so sent or conveyed, a letter not exempted from exclusive privilege of Postmaster-General, or performing otherwise than by post any services incidental to conveying such letters from place to place, or making a collection of exempted letters for the purpose of conveying the same (1 Vict. c. 33, s. 2). The conveyance of letters by the crew or passengers of mail ships otherwise than by the mails is made a penal offence by 54 & 55 Vict. c. 31.

Any master of a vessel outward bound refusing to take a mail tendered to him for conveyance, or opening or taking a letter from a mail, or not duly delivering a mail (*ibid.*, s. 6, and 3 & 4 Vict. c. 96, s. 37).

Any person employed to carry, convey, or deliver post letter bags or post letters losing same, or being guilty of drunkenness, negligence, or misconduct, and thereby endangering or delaying mails (*ibid.*, s. 7).

Any collector of tolls, ferryman, gatekeeper, etc., demanding toll for mails, or stopping or delaying mails (*ibid.*, s. 9).

Any person fraudulently removing from any post letter a postage stamp or postmark with intent to use same for some other letter, or doing certain other specific acts with intent to defraud the postal revenue (3 & 4 Vict. c. 96, s. 23).

Any company, corporation, or person transmitting or receiving, collecting or delivering any telegram in contravention of Postmaster-General's exclusive privilege (32 & 33 Vict. c. 73, s. 6).

Any undertakers, body, or person empowered by Act of Parliament to execute some work destroying or injuring any telegraphic line of the Postmaster-General, if telegraphic communication is thereby carelessly or wilfully interrupted (41 & 42 Vict. c. 76, s. 8), or obstructing the Postmaster-General or his agents in placing, maintaining, altering, examining, or repairing any telegraphic line (*ibid.*, s. 9).

Any person affixing or attempting to affix without due authority a placard, board, or thing on any post office, letter box, telegraph post, or other property of the Postmaster-General, or painting or disfiguring the same (47 & 48 Vict. c. 76, s. 5).

Any person making, issuing, or using any envelope, wrapper, card, etc., or stamps or marks in imitation of post office envelopes, forms, stamp, or marks (*ibid.*, s. 6).

Any person making, uttering, knowingly using, or having in posses-

sion without lawful excuse any fictitious stamp, or instruments for making same (*ibid.*, s. 7; see *Dickins v. Gill*, [1896] 2 Q. B. 310).

Any person placing or maintaining without due authority on any house, wall, window, or place the word "post office," etc. (*ibid.*, s. 8).

Any person wilfully obstructing post office officials or business (*ibid.*, s. 9).

[*N.B.*—Certain misdemeanors created by the statute last cited, and herein included under the head of *Indictable Offences*, *post*, and there distinguished by an asterisk *, are also triable summarily.]

Any person on board a British mail ship conveying any letter for delivery except mails sent by post (54 & 55 Vict. c. 31, s. 2).

Abettors in post office offences triable summarily are liable to the same penalties and punishment as the principal offenders (1 Vict. c. 36, s. 11).

(*b*) *Indictable Offences*.—Any person employed under the Post Office, opening or detaining or delaying a post letter contrary to his duty [Misdemeanor; imprisonment or fine] (1 Vict. c. 36, s. 25).

Any person employed under the Post Office stealing or embezzling, secreting or destroying a post letter [Felony; penal servitude; and if such post letter contain any chattel, or money, or valuable security, the maximum punishment is penal servitude for life] (*ibid.*, s. 26).

Any person stealing from or out of a post letter any chattel, money, or valuable security, or stealing a post letter bag, or a post letter from a post office or from a mail, or stopping a mail with intent to rob or search same [Felony; penal servitude for life] (*ibid.*, ss. 27, 28; see *R. v. James*, 1890, 24 Q. B. D. 439).

Any person stealing or unlawfully taking away a post letter bag sent by post office packet, or a letter out of such bag, or unlawfully opening such bag [Felony; penal servitude] (*ibid.*, s. 29).

Any person receiving any property the stealing, etc., whereof would be a felony under the Post Office Acts, knowing the same to have been stolen, etc. [Felony] (*ibid.*, s. 30).

Any person fraudulently retaining after delivery thereof by mistake any post letter or wilfully secreting or detaining any misdelivered letter or mail [Misdemeanor; imprisonment or fine] (*ibid.*, s. 31).

Any person soliciting or endeavouring to procure the commission of any crime under Post Office Acts [Misdemeanor; imprisonment] (*ibid.*, s. 36).

Any person forging or fraudulently using any die or plate denoting postal rates or duties, or unlawfully manufacturing or using paper similar to that used for postage stamps, etc. [Felony; penal servitude] (3 & 4 Vict. c. 96, ss. 22, 29).

Any person unlawfully receiving or possessing paper provided for use for postage stamps, etc., before being duly stamped and issued [Misdemeanor; imprisonment] (*ibid.*, s. 30).

Any officer of the Post Office granting or issuing any money order with a fraudulent intent [Felony; penal servitude] (11 & 12 Vict. c. 88, s. 4). This enactment is extended to postal orders, and these instruments are brought within the Forgery Act, 1861, and the Larceny Act, 1861, by 43 & 44 Vict. c. 33, s. 4. Any alteration, with intent to defraud, of the *crossing* of a postal order is a felony under sec. 3 of the same Act.

Any person employed under or acting for the Post Office disclosing, making known, or intercepting contents of a telegram contrary to his duty [Misdemeanor; imprisonment] (31 & 32 Vict. c. 110, s. 20).

* Any person placing or attempting to place in or against any post office letter box, any fire, match, light, explosive or dangerous substance or filth, or doing anything likely to injure such box or its contents [Misdemeanor; imprisonment or fine] (47 & 48 Vict. c. 76, s. 3).

* Any person sending or attempting to send a postal packet enclosing explosive, dangerous, or deleterious substance, or indecent or obscene print or article, or having thereon any words, etc., of indecent, obscene, or offensive character [Misdemeanor; imprisonment or fine] (*ibid.*, s. 4). As to causing and procuring to be sent by post a postal packet containing obscene literature, see *R. v. De Marny*, [1907] 1 K. B. 388.

* Any person forging or wilfully and without due authority altering a telegram or uttering forged telegram, or transmitting a false telegram [Misdemeanor; imprisonment or fine] (*ibid.*, s. 11).

* Any person in employ of a telegraph company improperly divulging purport of any telegram [Misdemeanor; imprisonment or fine] (*ibid.*).

Any person not in the employment of the Post Office maliciously, and with intent to injure any other person, opening, or causing to be opened, a letter intended for, and addressed to, any other person, or doing anything to prevent or impede the delivery of such a letter [Misdemeanor; fine or imprisonment. Section does not apply to a parent or guardian of the addressee of letter] (54 & 55 Vict. c. 46, s. 10).

Accessories to felonies (whether before or after the fact, except receivers), and aiders and abettors to misdemeanors punishable under the Post Office Acts, are indictable and punishable as principal offenders (1 Vict. c. 36, s. 35).

Numerous other offences committed by Post Office servants and other persons in connection with the postal service, but which are not the subject of special provisions in the Post Office Acts, are prosecuted by the department under the general law, *e.g.* embezzlement, forgery of orders, receipts, etc., conspiracy to defraud, simple larceny, obtaining money or goods by false pretences, etc. A forged telegram not in itself being one of the specific instruments mentioned in the Forgery Act, 1861, has been held (C. C. R.) to be a "forged instrument" within sec. 38 of that Act (*R. v. Riley*, [1896] 1 Q. B. 309). All prosecutions instituted by the Postmaster-General are under the general direction of the solicitor to the Post Office, and cases at assizes and sessions are conducted by counsel appointed by the Attorney-General, the indictments (when prepared by counsel) being settled by the pleader likewise appointed for that purpose.

[*Authorities.*—Lewins, *Her Majesty's Mails* (1865); H. Joyce, *History of the Post Office* (1893); Postmaster-General's *Annual Reports* (1855-1907); and other official publications.]

Post Office Orders.—Two kinds of orders for money are issued by the Post Office, namely, money orders and postal orders. Money orders are issued for any amount up to £40, and postal orders for fixed amounts from sixpence up to twenty-one shillings. A money order or postal order may, under the regulations of the Post Office, be crossed like a cheque; and payment of any order so crossed will only be made through a banker; and if the name of a banker is added, then through that banker. And it is provided by the regulations that, when a money order is presented through a bank, duly crossed with the name of such bank, by a person known to be in its employment, the usual

formalities observed on presentation in the ordinary way will be dispensed with. It has been held that these regulations do not make a money order presented through a bank a negotiable instrument, so as to protect the banker from liability for receiving payment of the order on behalf of a person having no title to it (*Fine Art Society v. Union Bank*, 1886, 17 Q. B. D. 705). Postal orders are described on the face as "not negotiable," and therefore, although they are assignable after having been receipted by the payee, apparently they are also subject to the ordinary rule of law (expressed in the maxim "*Nemo dat quod non habet*"), that no person can give to another a better title than he has himself. After once paying a money or postal order, by whomsoever presented, the Post Office is not liable to any further claim. See POST OFFICE, iii. *Offences*, ante, p. 351.

Potwaller; Potwalloper. — A potwaller, or, as it has sometimes been termed, a potwalloper, is an individual, either a householder or lodger, who furnishes and cooks his own food at his own fireplace. Such persons were entitled to the parliamentary electoral franchise in certain cities and boroughs before 1832.

"Potwalloper," meaning literally one who boils a pot, is defined in *Webster's Dictionary* as a voter in certain boroughs of England, where, before the passage of the Reform Bill of 1832, the qualification for suffrage was to have boiled (walloped) his own pot in the parish for six months (see also Skeat, *Etymological Dict. of Eng. Language*).

The Representation of the People Act, 1832, in placing the parliamentary franchise on a statutory basis, expressly reserved certain ancient franchises existing in boroughs and cities at the time of the passing of the Act, *i.e.* June 7, 1832). Among the persons to whom the right of voting at elections of members for cities or boroughs was temporarily reserved were electors who were at the time of the passing of the Act qualified in respect of residency as "potwallers," provided that they were qualified as electors according to the usages and customs of the city or borough, or any law in force at the time of the passing of the Act (see the Representation of the People Act, 1832, s. 33; see also 26 Geo. III. c. 100).

In the *Taunton Case* (*Curry's Case*, 1838, Falc. & Fitz., at p. 311) it was held that the ancient and reserved right of voting in the election of members to serve in Parliament for the borough of Taunton was in inhabitant potwallers having a settlement and not having received alms or charity within a year before the election, and that a potwaller, according to the usage of the borough, was one, whether he be a householder or lodger, who has the sole dominion over a room with a fireplace in it, and who furnishes and cooks his own diet at his own fireplace, or at some other place within the same house at which fireplace he had a legal right so to do, and who has actually cooked his diet at such fireplace; to entitle such potwaller to vote, he must also have resided within the borough for six months previous to the day of election according to the Statute 26 Geo. III. c. 100.

In the same case it was held that when a potwaller had retained the room in respect of which he had been registered, but had resided for several months previous to the election out of the borough, his vote was bad (*Davey's Case*, *ibid.*, at p. 313; see also *Allen v. House*, 1845, 7 Man. & G. 157).

The subject is now of historic rather than of practical interest, for

there are extremely few, if any, persons now on the parliamentary register as entitled to the franchise under this ancient reserved right (see the Return of Parliamentary Constituencies (Electors, etc.) Parliamentary Paper No. 131 of 1897). On the register for 1896 there was one inhabitant householder qualified as a potwaller (see Return of Parliamentary Constituencies (Electors, etc.) Parliamentary Paper No. 76 of 1896). It is, however, possible, as has been pointed out, that some of the ancient franchises may be in abeyance owing to the persons entitled to them being in receipt of parochial relief (see Rogers on *Elections*, 16th ed., 1897, vol. i., "Registration," p. 171, note (b); see also the Parliamentary Voters Registration Act, 1843, 6 & 7 Vict. c. 18, s. 78).

See FRANCHISE (ELECTORAL); REGISTRATION OF VOTERS.

Poundage.—*History.*—In former times customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, etc. Of these, tonnage and poundage were originally granted for the defence of the realm, by keeping and safeguarding the seas, so that merchandise might safely enter and pass out of the country. At first they seem to have been granted only for stated terms, as for two years in the fifth year of Richard II.; but an Act of the 31 Hen. VI. 1452, gave them to the King for life. To Edward IV. and his successors, down to Charles I., they were also granted for life; but in the reign of the last-mentioned monarch the usual grant was omitted. For fifteen years, nevertheless, they were levied without consent of Parliament; but by 16 Car. I. (1640), c. 8, the Crown renounced the rights to levy these duties without consent of Parliament. After the Restoration the grant for life was again made, both to Charles II. and his two next successors; but during that period the Commons got more and more control of the public funds, and by 9 Anne (1710), c. 6; 1 Geo. I. (1714), c. 12; and 3 Geo. I. (1716), c. 7, these duties were made perpetual, and made security for the national debt. The Customs Consolidation Act, 1787, 27 Geo. III. c. 13, inaugurated a new era, and since that Act it has been the practice for Parliament from time to time to pass measures fixing what duties shall be leviable upon merchandise imported or exported. There is a long list of such enactments. It is right to add that originally poundage was imposed *ad valorem* at the rate of twelve pence in the pound on all merchandise whatsoever.

Modern Law.—At the present day, an important charge, called poundage, is deducted from the pound by sheriffs as part of their remuneration. At common law these officers were bound to execute the Crown writs without fee or reward, but the Statute 29 Eliz. (1586), c. 4, now repealed by the Sheriffs Act, 1887, 50 & 51 Vict. c. 55, s. 39, gave them the right to exact poundage. Now by the R. S. C., 1883, Order 42, r. 15, in every case of execution the party entitled to execution may levy the poundage fees and expenses of execution over and above the sum recovered.

By sec. 20, subsec. 1, of the Sheriffs Act, 1887, a sheriff is entitled, in respect of all sums due to the Crown, and collected by him under process of any Court, to an allowance upon his accounts of 1s. 6d. in the pound for every sum not exceeding £100, and 1s. for every pound exceeding the first £100. By subs. 2, for the execution of other process than that just mentioned, such fees are exactable as the Lord Chancellor, with the advice of the judges may fix; and under this subsection, on August 31,

1888, the judges issued an order fixing the fees for writs of *fi. fa.* (see *Ann. Prac.*). With respect to poundage, that order states that the fee for delivery of the writ to the undersheriff, and the sheriff's poundage shall remain as before, that is to say, 1s. in the pound if the sum levied does not exceed £100, and 6d. for every pound over and above that sum (*cp.* s. 39, subs. 5 of the Act). No other reward is to be taken by the sheriff beyond the fees so fixed (subs. 3); and if a sheriff dies, his successor must account to his estate for a proportion of the fees, etc., calculated on the amount of trouble each may have had (subs. 4). Sheriffs' poundage on writs of *ca. sa.* were abolished by 5 & 6 Vict. c. 98, s. 31).

The sheriff's poundage is calculated on the sum received under the execution only, and not on the amount claimed or seized (*R. v. Robinson*, 1835, 2 C. M. & R. 334), [and to entitle him to his poundage money must actually have been obtained by compulsion from the judgment debtor and the sheriff must have it in hand for the judgment creditor (*In re Ludmere*, 1884, 13 Q. B. D., at p. 417)]. So where two seizures were made in two counties, under two different writs, and the whole debt realised under one, the poundage in the other was disallowed (*Lee v. Dangar*, [1892] 2 Q. B. 337)]. If a portion of what is realised by his sale is paid away, as to a landlord for rent, that will not affect the amount of his poundage (*Davies v. Edmonds*, 1843, 12 Mee. & W. 31). An unintentional overcharge for poundage due to a clerical error is not an extortion for which a penalty may be recovered under the Sheriffs Act, 1887, *supra*, s. 29 (*Shopee v. Nathan & Co.*, [1892] 1 Q. B. 245). If, however, a sheriff sells under a *venditioni exponas*, he may not deduct anything for poundage, but must make a return of the gross sum, when the Court will order it to be paid over, deducting poundage (*R. v. Jones*, 1814, 1 Price, 205). And a sheriff's officer cannot maintain an action against an execution creditor for expenses incurred under a writ of *fi. fa.* issued by the creditor in making inquiries as to the goods of the execution debtor (*Smith v. Broadbent & Co.*, [1892] 1 Q. B. 551). So when the bankruptcy of the judgment debtor supervenes upon seizure, but before sale by the sheriff, the sheriff is not entitled to poundage under the words "costs of execution" in subs. 1 of sec. 46 of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52 (*In re Ludford*, 1884, 13 Q. B. D. 415). [But he is not entitled to poundage where after seizure a receiving order is made against the execution debtor, and the goods are issued to the official receiver under the Bankruptcy Act, 1890, s. 11 (1) (see *In re Thomas*, [1899] 1 Q. B. 460), on the ground that where there is no sale there can be no poundage. As to what costs of execution a sheriff is entitled when his possession is interrupted by an act of bankruptcy, see *In re English & Ayling*, [1903] 1 K. B. 680.] But a compromise effected by the parties before he sells will not affect his right to poundage (*Alchin v. Wells*, 1793, 5 T. R. 470), nor the fact that the execution is set aside for irregularity (*Bullen v. Ansley*, 1807, 6 Esp. 111), though if the judgment and all subsequent proceedings are set aside, that will deprive him (*Miles v. Harris*, 1862, 12 C. B. N. S. 550). Where the party with whom a sheriff deposits goods seized parts with them, the latter cannot seize them again merely for the purpose of securing poundage, at all events if the execution was fraudulent (*Goode v. Langley*, 1827, 7 Barn. & Cress. 26). In every case where an execution is withdrawn or satisfied, the sheriff's fees and poundage shall be paid by the person issuing the execution or stopping the sale (see Order of 1888; see further, EXECUTION, Vol. V. pp. 485 *et seq.*).

So, too, on a writ of *elegit* a sheriff, to be entitled to poundage, must have actually extended land, and if there are several writs, and poundage has been allowed one, he will not be entitled to any on subsequent writs of the same creditor, though under different judgments (*Carter v. Hughes*, 1858, 27 L. J. Ex. 225). But where two extents issue into different counties, the sheriff who completes his levy is entitled to full poundage (*R. v. Caldwell*, 1792, 1 Anst. 279), even though the debt is voluntarily paid to him (*R. v. Fry*, 1793, 2 Anst. 358). There is no right to levy poundage, however, under an extent on a simple contract debt (*R. v. Tidmarsh*, 1817, 5 Price, 189), nor out of money levied upon an attachment for non-payment of money (*R. v. Palmer*, 1802, 2 East, 411).

Income tax collectors were formerly remunerated by poundage, but the Income Tax (Public Offices) Act, 1872, 35 & 36 Vict. c. 82, abolished poundage for the collection of income tax in public departments, and substituted salaries; and 54 & 55 Vict. (1891), c. 13, s. 1, abolished the poundage to which the clerks to the Commissioners of Income Tax and the assessors were entitled by the Taxes Management Act, 1880, 43 & 44 Vict. c. 19, ss. 41 (2), 47, 80, and Sched. 1.

Pound; Pound-breach.—A pound is a place for the detention of the animals or goods of others lawfully seized. A legal right to seize and impound such animals or goods arises—

(i.) In the case of distress for rent (see DISTRESS, Vol. IV., at p. 641).

(ii.) In the case of animals found *damage feasant* on the land of the person seizing (see DISTRESS, Vol. IV. p. 643).

(iii.) In the case of ESTRAYS.

(iv.) In the case of a writ or other legal process authorising seizure, whether by an officer or by a private person.

Goods are now impounded only under distress for rents. As to the procedure in such cases, see DISTRESS, Vol. IV. p. 639; *Jones v. Biernstein*, 1900, 1 Q. B. 100.

An impounded animal must be detained in a pound to which the owner can have access to give it food and water (Stat. Exch. 1 Rev. Stat., 2nd ed., 75). Under the Statute of Marlbridge, 52 Hen. III. c. 4, a distress must not be driven out of the county in which it is taken (2 Co. Inst., 106); and under 1 & 2 Phil. & Mary, c. 12, it must not be driven out of the hundred, except to a pound overt in the same county. But breach of the statute does not make the distrainer a trespasser (*Gimbart v. Pelah*, 1747, 2 Stra. 1272). Animals distrained at one time must be impounded in one place (1 & 2 Phil. & Mary, c. 12).

The proper place for impounding cattle is a public open pound made for the purpose, if there is a proper and convenient one in the neighbourhood, "which exists by custom, tenure, or agreement among the inhabitants of a vill or manor and not by the common law" (*Vaspor v. Edwards*, 1700, 12 Mod. 664, Holt, C.J.). Since the inclosure of the country, the provision of such pounds has been greatly neglected, and in the case of distresses for rent it is now legal to detain the animals on any inclosed land of the distrainer. But in the case of distress *damage feasant* it seems still necessary, if possible, to impound in the manorial or other public pound, where the animal is in the custody of the law and not of the party (*Green v. Duckett*, 1883, 11 Q. B. D., at p. 280). Till this is done, the owner can demand the animal back on tender of amends. When it is done he must

replevy the animal. Where the pound is covert or close, *i.e.* in premises to which the owner has no legal right of access, the distrainer must feed the animals (1 Co. *Inst.*, 47). Common pounds are under the charge of a pinder or pound-keeper, who must receive every animal brought to be impounded, irrespective of the legality of the seizure (*Badkin v. Powell*, 1776, 1 Cowp. 476). The fees for impounding are limited by 1 & 2 Phil. & Mary, c. 12, s. 2, to 4d. for any one whole distress, and contrary usages or prescriptions are abolished. To take more is extortion (*Badkin v. Powell*, *ubi supra*; *Green v. Duckett*, *ubi supra*). See Bullen on *Distress* 2nd ed., 171-180.

In the case of distress for rent the animal must be impounded for five days, which may be extended to fifteen days at the request of the tenant or the owner of the animal (1888, c. 21, s. 6); animals impounded damage feasant may not be sold within fifteen days of seizure (Stat. Exch.: 51 Hen. III. stat. 4, Ruffhead).

At common law the person impounding an animal in an open pound is under no obligation to feed it, and has no right to charge for its keep (Stat. Exch., *ubi supra*). The pound-keeper is under no obligation to feed the animals (*Dargan v. Davies*, 1876, 2 Q. B. D. 118).

Under the Prevention of Cruelty to Animals Act, 1849, 12 & 13 Vict. c. 92, ss. 5, 6, the person who causes animals to be impounded must, under penalty, while confinement continues, provide a sufficient quantity of fit and wholesome food; but this obligation does not extend to the pound-keeper (*Dargan v. Davies*, 1876, 2 Q. B. D. 118).

The impounder who discharges this obligation may recover not more than double the cost from the owner by summary proceedings, or seven clear days after impounding may sell the animal (after three days' public printed notice) in a public market for the best price obtainable. The proceeds, after paying the cost of food and sale, are paid over to the owner (17 & 18 Vict. c. 60, s. 1).

If impounded animals are left unfed for twelve hours, any person, whether owner or not, may enter the pound and feed them and charge the cost to the owner of the animal, which may be detained till payment (12 & 13 Vict. c. 92, s. 6). Persons who interfere with or obstruct pound-keepers acting under the above provisions are liable to penalties on summary conviction (s. 20).

Local authorities in London are empowered to establish a green yard (a pound in all but name), to which to take animals and goods found unclaimed in public places (*Badkin v. Powell*, 1776, 1 Cowp. 476; 57 Geo. III. c. xxix. s. 109).

In districts to which the Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, applies (see 38 & 39 Vict. c. 55, s. 171), the police are entitled to impound stray cattle in any common pound (which may be provided by the district council) until a penalty, not exceeding forty shillings and the cost of keep, is paid to the district council. If payment is not made in seven days, the cattle may be sold. This provision is in addition to the penalties and powers of the Highway Acts, 1835, 5 & 6 Will. IV. c. 50, ss. 24, 25; and 1862, 27 & 28 Vict. c. 101, s. 25, as to animals straying on HIGHWAYS (Vol. VI. p. 566).

The pound-keeper is bound to receive animals brought to the pound without inquiring as to legality of their seizure, and is not liable if it were illegal.

Where animals are put into a proper pound they are in the custody of the law, and the person impounding is not liable if they are thence

stolen or thus injured (*Vaspor v. Edwards*, 1700, 12 Mod. 662; *Wilder v. Speer*, 1838, 3 N. & P. 536). If the pound is not fit and proper the distrainor is liable for any consequent injury to the distress or for its escape (*ibid.*).

The person who distrains goods or animals cannot use them, the distress, whether for rent or damage, being but a gage (*Vaspor v. Edwards*, 1700, 12 Mod. 662).

The release of cattle lawfully impounded, or damaging or destroying the pound with that object, is the offence of pound-breach, and appears still to be an indictable misdemeanor (1 Co. *Inst.*, 47; *R. v. Butterfield*, 1892, 17 Cox C. C. 598), but is usually punished on summary conviction—

(i.) As to pounds within the Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, s. 26, by imprisonment for not over three months.

(ii.) As to releasing animals impounded under the Highway Act, 1835, 5 & 6 Will. IV. c. 50, by imprisonment for not over three months (s. 26).

(iii.) As to rescue before or after impounding of cattle distrained when straying or damage feasant, by fine not exceeding £5, or imprisonment on default, with or without hard labour (6 & 7 Vict. c. 30, s. 1). The justices may award the whole or part of the penalty to the person by or for whom the cattle were impounded. The justices cannot try the charge if questions of title to land arise, or as to obligations to maintain fences and the like, or questions of bankruptcy (s. 2).

By 2 Will. & Mary, c. 5, s. 3, and 4 Geo. II. c. 19, s. 10, a civil remedy in treble damages is given for pound-breach or rescue of distress.

Pour faire proclamer.—An ancient writ addressed to the mayor or bailiff of a city or town, requiring him to make proclamation that none cast filth into the ditches or places near such city or town, to the nuisance thereof; and if any be cast there already, to remove the same. It was founded on the Statute 12 Rich. II. c. 13, which was repealed by 19 & 20 Vict. c. 64, and S. L. R. 1875.

Power of Attorney.—A power of attorney is an authority given by a formal instrument, usually under seal, whereby one person, who is called the donor or principal, authorises another person, who is called the donee, attorney, or agent, to act on his behalf. A general power of attorney is one by which authority is given to act for the principal in all matters, or in all matters of a particular nature, or concerning a particular business. A special power of attorney is one by which authority is given to do some particular specified act. The law relating to powers of attorney is a branch of the law of agency.

Capacity of Parties.—The capacity to appoint an attorney is, as a general rule, coextensive with capacity to contract. A power of attorney given by an infant is, except as provided by the Conveyancing Act, 1881 (cited below), void (*Zouch v. Parsons*, 1765, 3 Burr. 1794, 1804; *Combe's Case*, 9 Co. Rep. 75; 77 E. R. 843). The same rule applies to a power of attorney given by a lunatic, subject to the qualification that if he is apparently sane he will be bound by the acts of the attorney, done in pursuance of the power, with respect to any third person who, without notice of the insanity, deals with the attorney for valuable consideration

on the faith of the power (*Elliot v. Ince*, 1857, 7 De G., M. & G. 475; 44 E. R. 186; *Ex parte Bradbury*, 1839, Mont. & Chit. 625; *Daily Telegraph Co. v. McLaughlin*, [1904] A. C. 776). Formerly, a married woman was not competent to appoint an attorney, but the 40th section of the Conveyancing Act, 1881, provides with respect to deeds executed after the commencement of the Act, that a married woman, whether an infant or not, shall have power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do. Any person of sound mind is competent to act as an attorney. The act of an agent is deemed to be the act of the principal who authorised it, the agent being looked upon as a mere instrument, and it is therefore not necessary that the agent should be *sui juris*, or competent to act or contract on his own behalf. As to the acts which may be done through or by means of an agent or attorney, see PRINCIPAL AND AGENT.

Form and Execution of the Instrument.—The instrument creating a power of attorney may be either a deed-poll or an indenture. It is not necessary in the case of an indenture that the attorney should be a party to it (*Moyle v. Ever*, Cro. Eliz. 905; 78 E. R. 1127), and a power of attorney is frequently given by a clause in an instrument containing other matters. The execution by the principal is generally, and in some cases (*e.g.* in the case of a power of attorney to transfer stock in the books of the Bank of England) must be attested by two witnesses. A forged power of attorney is wholly inoperative with respect to the person by whom it purports to have been executed, and no right or title can be acquired under or by means thereof as against him (*Marsh v. Keating*, 1834, 1 Bing. N. C. 198; 37 R. R. 75; *Bank of Ireland v. Evans' Trustees*, 1855, 5 Cl. H. L. 389; *Merchants of Staple v. Bank of England*, 1888, 21 Q. B. D. 160). As to the liability of a donee acting in good faith under a forged power, see *Starkey v. Bank of England*, [1903] A. C. 114.

Extent of Authority Conferred.—Powers of attorney are construed strictly, and give such authority only as they confer expressly or by necessary implication (*Bryant v. La Banque du Peuple*, [1893] A. C. 170). Where a resident director and manager of a mining company was authorised "to direct the mine so as most effectually to promote the interests of the company, to employ workmen, provide needful implements, etc.," it was held that he had no authority to bind the company by accepting bills of exchange (*Brown v. Byers*, 1847, 16 Mee. & W. 252). So, a power to purchase goods in connection with the donor's business, either for cash or on credit, "and where necessary in connection with any purchases made . . . as aforesaid, or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes, does not confer a general power to borrow money or authorise the donee to accept bills of exchange on behalf of the donor in consideration of a loan (*Jacobs v. Morris*, [1902] 1 Ch. 816). A power of attorney given by an executor "to transact in his name all the affairs of the testator" does not authorise the acceptance of a bill of exchange in the name of the executor so as to bind him personally (*Gardner v. Baillie*, 1796, 6 T. R. 591; 3 R. R. 531, 538). A power to "recover and receive all sums of money," owing or payable to the donor, "by virtue of any security," and "to give, sign, and execute receipts, releases, and other discharges for the same," and "to sell any real or personal property now or hereafter belonging" to

the donor, does not authorise the donee to exercise a power of sale conferred on the donor as mortgagee by a mortgage deed (*In re Dowson and Jenkins' Contract*, [1904] 2 Ch. 219). And a power "from time to time to negotiate, make sale, dispose of, assign, and transfer" gives no authority to pledge (*Jonmenjoy Coondoo v. Watson*, 1884, 9 App. Cas. 561; *De Bouchout v. Goldsmid*, 1800, 5 Ves. Jun. 211; 31 E. R. 551). A power "to sell, indorse, and assign" has, however, been construed as giving—(1) authority to sell; (2) authority to indorse; and (3) authority to assign, and therefore as authorising an indorsement as security for a loan to the attorney (*Bank of Bengal v. Macleod*, 1849, 5 Moo. Ind. Ap. 1; 18 E. R. 795; *Bank of Bengal v. Fagan*, 1849, 5 Moo. Ind. Ap. 27; 18 E. R. 804). The operative part of the deed may be controlled by the recitals. Thus, where it was recited that the principal was going abroad, and the operative part gave authority in general terms, it was held that the authority subsisted only during his absence abroad (*Danby v. Coutts*, 1885, 29 Ch. D. 500).

General words in a power of attorney do not confer general powers, but are restricted to what is necessary for the proper execution of the special powers (*Perry v. Holl*, 1860, 2 De G., F. & J. 38; 45 E. R. 536), and are construed as enlarging the special powers when necessary, and only when necessary, for the accomplishment of the purpose for which the authority is given (*Lewis v. Ramsdale*, 1886, 55 L. T. 179; *Attwood v. Munnings*, 1827, 7 Barn. & Cress. 278; 31 R. R. 194; *Harper v. Godsell*, 1870, L. R. 5 Q. B. 422). A power "to demand and receive all moneys due to the principal on any account whatsoever, and to use all means for the recovery thereof, to appoint attorneys to bring actions, and to revoke such appointments, and to do all other business," does not authorise the attorney to indorse a bill of exchange received by him under the power, the words "all other business" being construed as meaning all other business necessary for, or in connection with, the recovery of the moneys (*Hogg v. Snaith*, 1808, 1 Taun. 347; 9 R. R. 788; *Hay v. Goldsmidt*, 1804, 1 Taun. 349; 9 R. R. 790; *Esdaille v. La Nauze*, 1840, 1 Y. & C. Ex. 394; 41 R. R. 299; *Murray v. East India Co.*, 1821, 5 Barn. & Ald. 204; 24 R. R. 325).

The deed will be construed so as to include all medium powers necessary for its effective execution, and as authorising all acts which are incidental to the execution of the express powers in the ordinary way (*Withington v. Herring*, 1829, 5 Bing. 442; *Howard v. Baillie*, 1796, 2 Black. (H.) 618; 3 R. R. 531; *Willis v. Palmer*, 1860, 7 C. B. N. S. 340; *Henley v. Soper*, 1828, 8 Barn. & Cress. 16; *In re Wallace*, 1884, 14 Q. B. D. 22; *Davy v. Waller*, 1899, 81 L. T. 107). See also PRINCIPAL AND AGENT (*Implied Authority*).

Execution of the Power.—It was formerly necessary that all deeds executed in pursuance of a power of attorney should be executed in the name of the principal, in order to render them binding upon him, or entitle him to sue upon them (*White v. Cuyler*, 1795, 6 T. R. 176; 3 R. R. 147; *Wilks v. Back*, 1802, 2 East, 142; 6 R. R. 409; *Berkeley v. Hardy*, 1826, 8 Dow. & Ry. K. B. 102; 29 R. R. 261; *Southampton v. Brown*, 1827, 6 Barn. & Cress. 718; 30 R. R. 511). But the Conveyancing Act, 1881, provides, by sec. 46, that the donee of a power of attorney may execute or do any assurance, instrument, or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual

in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. The attorney must still, however, execute all deeds in the principal's name, if he wishes to avoid personal liability thereon. Where a person covenants under his own hand and seal for the act of another, he is personally liable, even if he describes himself as covenanting for and on behalf of such other person (*Appleton v. Binks*, 1804, 5 East, 148; 7 R. R. 672; *Cass v. Rudele*, 1692, 2 Vern. 280; 23 E. R. 781). As to the power of an attorney to delegate his authority, and as to the execution of a power given to two or more persons jointly, and the respective rights and liabilities of the attorney and principal as between themselves, and with respect to third persons, see PRINCIPAL AND AGENT.

Revocation.—Provisions are made by the Conveyancing Act, 1882, whereby powers of attorney may be rendered irrevocable in favour of purchasers for valuable consideration. The 8th section provides that if a power of attorney, created by an instrument executed after December 31, 1882, and given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser, it shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor; and any act done at any time by the donee in pursuance of the power shall be as valid as if anything done by the donor without his concurrence, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor, had not been done or happened; and neither the donee nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor. The 9th section makes similar provisions with regard to a power of attorney, whether given for valuable consideration or not, which is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument. In protection of persons making payments and doing acts in pursuance of a power of attorney without notice of the revocation thereof, the 47th section of the Conveyancing Act, 1881, provides that any person making or doing any payment or act in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same. But the section is not to affect any right against the payee of any person interested in any money so paid; and such person has the like remedy against the payee as he would have had against the payer if the payment had not been made by him. Subject to the above statutory provisions, the law with regard to the revocation of a power of attorney, and the determination of the attorney's authority, is the same as the law with regard to the revocation and determination of the authority of agents generally, as to which see PRINCIPAL AND AGENT. A power of attorney may be revoked by a verbal notice of revocation (*The Margaret Mitchell*, 1858, Swa. Ad. 382; *R. v. Wait*, 1823, 11 Price Ex. 518).

Provision is made by the 48th section of the Conveyancing Act

for the deposit at the Central Office of instruments creating powers of attorney, and for the inspection and delivery of office copies of instruments so deposited.

As to the stamping of powers of attorney, see schedule to Stamp Act, 1891, and secs. 80 and 81 thereof, and sec. 11 of the Finance Act, 1895.

POWERS OF ATTORNEY—COMMON FORMS.

Commence-
ment and
witnessing
part where
there are
no recitals.

The same
where there
are several
principals
and
attorneys.

Commence-
ment and
witnessing
part where
there are
recitals.

The same
where there
are several
principals
and
attorneys.

Power to
enforce or
resist
claims.

Power to
bring
actions, &c.

Power to
receive
money,
give re-
ceipts, &c.

Power to
draw bills,
&c.

KNOW ALL MEN BY THESE PRESENTS, that in consideration of [*state the consideration if any*], I, A. B., of, &c., do hereby appoint C. D., of, &c., my attorney for me in my name to, &c.

KNOW ALL MEN BY THESE PRESENTS [*in consideration, &c.*], that we, A. B., of, &c., C. D., of, &c., and E. F., of, &c., do and each of us doth hereby appoint G. H., of, &c., J. K., of, &c., and L. M., of, &c., and any one or more of them, our attorneys and attorney for us the said A. B., C. D., and E. F., and any one or more of us, and in the names or name of us or any one or more of us to, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, A. B., of, &c., sends greeting : WHEREAS [*recitals*] : NOW THESE PRESENTS WITNESS, that [*in consideration, &c.*] he the said A. B. doth hereby appoint C. D., of, &c., his attorney for him and in his name to, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, A. B., of, &c., C. D., of, &c., and E. F., of, &c., send greeting : WHEREAS [*recitals*] : NOW THESE PRESENTS WITNESS, that they the said A. B., C. D., and E. F., do and each of them doth hereby appoint G. H., of, &c., J. K., of, &c., and L. M., of, &c., and any one or more of them, the attorneys and attorney of the said A. B., C. D., and E. F., and any one or more of them, for them the said A. B., C. D., and E. F., and any one or more of them, and in their or his names or name, to, &c.

TO ENFORCE, resist, allow, remit, set off, compromise, or refer to arbitration, any claim by or against me [*or us or either of us*] in respect of the premises.

TO INSTITUTE and carry on, or discontinue and to defend, or compromise, or to confess judgment, or allow judgment to go by default in, any action or legal proceeding in relation to the premises or any of them.

TO DEMAND, receive, take transfers of, and recover or allow in account, any money or property belonging to me [*or us or any one or more of us*], and to give receipts, discharges and releases, and in a proper case indemnities, for or in respect of any money or property so received or allowed in account by, or transferred or delivered to, the attorney [*or attorneys or any one or more of them*] under or by virtue of these presents.

TO DRAW, accept, indorse, give, make or negotiate, any cheque, bill, note, guarantee or other security for any of the purposes hereof.

Power to execute instruments, &c.

TO EXECUTE and do, or concur in or cause to be executed and done, all such deeds, instruments and things in relation to the premises as in the absolute discretion of the said [attorneys or] attorney shall seem expedient as fully and effectually as I [or we or any one or more of us] could have done if personally present.

General words where there are one principal and one attorney.

AND GENERALLY to execute and do all such deeds and things in relation to the premises as the said attorney shall think expedient, as fully and effectually as the said [*principal*] could have done if personally present.

General words where there are several principals and attorneys.

AND GENERALLY to execute and do all such deeds and things in relation to the premises as the said attorneys or attorney shall think expedient, as fully and effectually as the said [*principals*], or any one or more of them, could have done if personally present.

Power to appoint substitutes.

AND ALSO from time to time to substitute and appoint any person or persons to act under or in place of the said [attorneys or] attorney in all or any of the matters aforesaid, and from time to time every such substitution and appointment at pleasure to revoke.

Agreement to ratify the attorney's acts.

AND HE [OR THEY] THE SAID [*principal or principals*] [do and each of them doth] hereby covenants [or jointly and severally covenant] to ratify and confirm whatsoever the said [attorneys or] attorney, or [their or] his substitute or substitutes, shall do or cause to be done in or about the premises by virtue of these presents, including in such confirmation whatsoever shall be done between the time of the decease of the said [*principal or of the survivor of the said principals*] or the revocation by other means of these presents, and the time of such decease or revocation becoming known to the said [attorneys or] attorney [or their] or his substitute or substitutes.

Indemnity clause.

AND IT IS HEREBY DECLARED, that the attorneys for the time being acting under these presents shall be respectively chargeable only with such moneys or property as they shall respectively actually receive, notwithstanding their signing any receipt for the sake of conformity, and shall not be answerable the one for the other of them, nor for the act or default of any substitute, deputy, agent, banker or broker into whose hands any moneys or property shall come under these presents, nor for any loss whatsoever, unless the same shall happen through their own default respectively.

Appointment of another attorney in case of the incapacity, refusal, or death, of the original attorneys.

AND IN CASE OF THE ABSENCE of the said attorneys, or either of them, from the place where the deeds and things aforesaid or any of them shall be or ought to be executed and done, or of their or his inability or refusal to execute and do such deeds and things or any of them, or in case the said attorneys, or either of them, shall die, then I hereby appoint [A. B.], of, &c., to act as my attorney in the stead of the said [C. D.] and [E. F.] [*the original attorneys*], or either of them, as the case may require, either from time to time during such absence, or so long and so far as such inability or refusal shall continue or extend, or in case of such death, then until all the powers expressed to be hereby given shall be determined, in like manner as if the name of the said [A. B.] were

thenceforth inserted in these presents, instead of the names or name of the attorneys or attorney so being absent, or becoming unable, or refusing, or dying as aforesaid.

Power to be irrevocable.

PROVIDED ALWAYS that these presents shall be irrevocable [for a period of calendar months from the date hereof].

Testimonium, form of execution and attestation of deed executed by attorney.

IN WITNESS WHEREOF [attorney], of, &c., by virtue of a power of attorney under the hand and seal of the said [principal], dated the day of 19 , and hereunto annexed [or a true copy whereof is hereunto annexed], hath hereunto set the hand and seal of the said [principal] the day and year first above written [on this day of 19].

A. B. [the principal] by C. D. [the attorney].

Signed, sealed, and delivered by the within-named [attorney] as the attorney of the within-named [principal] in the presence of [witness].

PRECEDENTS.

I. POWER to EXECUTE an INDENTURE.

KNOW ALL MEN BY THESE PRESENTS, That I [principal], of, &c., Do hereby appoint [attorney], of, &c., my attorney, for me and in my name, and as my act and deed, to sign, seal, and deliver a certain indenture already prepared and engrossed, bearing date or intended to bear date on or about the day of 19 , expressed or intended to be made between me, by my name and description of [insert description], of the one part; and [A. B.], of, &c., of the other part; whereby certain freehold messuages and hereditaments, situate at , in the county of , and known as , are or are intended to be conveyed by me to the said [A. B.], by way of mortgage to secure the payment of a sum of £ , and interest thereon, at the rate of per cent. per annum, as therein mentioned [or otherwise as the case may be; power to appoint substitutes, agreement to ratify, power to be irrevocable, pp. 364, 365].

IN WITNESS, &c.

II. POWER to AFFIX the SEAL of a JOINT STOCK COMPANY to Instruments executed abroad.

KNOW ALL MEN BY THESE PRESENTS, that the Company, Limited, being a company registered and incorporated in England under the Companies Acts, 1862 to 1900, and having their registered office at , in England, do hereby appoint [attorney], of, &c., and [attorney], of, &c., to be the attorneys of the company in , to affix in conformity with the provisions of the Companies Seals Act, 1864, the seal of the company to all deeds, contracts, instruments, and documents whatsoever to which the company are or may hereafter be made parties; And the com-

pany direct that the said [*attorneys*] shall on the sealing, under this power, of any such deed, contract, instrument, or document as aforesaid, indorse thereon a certificate signed by them of such sealing [*power to be irrevocable*, p. 365].

III. *POWER to SURRENDER COPYHOLDS.*

KNOW ALL MEN BY THESE PRESENTS, that I [*principal*], of, &c., one of the copyhold or customary tenants of the Manor of _____, in the county of _____, do hereby appoint [*attorney*], of, &c., my attorney for me and on my behalf to appear at the next or some subsequent general Court to be holden for the said manor, or before the lord or lady, lords or ladies, or his, her, or their steward or deputy steward for the time being out of Court, and to surrender into the hands of the said lord or lady, or lords or ladies, either personally or by the hands and acceptance of the said steward or deputy steward, by the rod, and according to the custom of the said manor, ALL THOSE, &c. [*describe parcels*], to the use of [*purchaser*], of, &c., his heirs and assigns for ever, according to the custom of the said manor; And generally to do, perform, and execute all other acts and things as shall be requisite for the purpose of procuring the said [*purchaser*], his heirs or assigns, to be admitted tenant or tenants of the said premises, and for assuring the same to the use of the said [*purchaser*], his heirs and assigns for ever, according to said custom; I hereby covenanting to ratify and confirm all that my said attorney shall do or cause to be done in or about the premises by virtue of these presents [*power to be irrevocable*, p. 365].

IN WITNESS, &c.

IV. *POWER to OBTAIN ADMITTANCE to COPYHOLDS.*

KNOW ALL MEN BY THESE PRESENTS, that I [*principal*], of, &c., one of the copyhold or customary tenants of the Manor of _____, in the county of _____, hereby appoint [*attorney*], of, &c., for me and on my behalf to appear, &c. [*as in last Precedent*], and to pray for and receive and take from such lord or lady, lords or ladies, steward or deputy steward, by the rod, and according to the custom of the said manor, admittance to ALL THOSE, &c. [*describe parcels*], to the use of me the said [*principal*], my heirs and assigns, according to the said custom, SUBJECT nevertheless to a condition for making void the same admittance if [*mortgagor*], of, &c., his heirs, executors, administrators, or assigns, shall on the day of _____ next, pay to me the said [*principal*], my executors, administrators, or assigns, the sum of £ _____, with interest for the same in the mean time at the rate of _____ per cent. per annum; I hereby agreeing to ratify and confirm all that my said attorney shall do or cause to be done in or about the premises, by virtue of these presents [*power to be irrevocable*, p. 365].

IN WITNESS, &c.

V. *POWER to RECOVER a DEBT.*

KNOW ALL MEN BY THESE PRESENTS, that I [*principal*], of Cheapside, in the City of London, linen merchant, hereby appoint [*attorney*], of, &c., my attorney, for me and in my name to demand, sue for and recover all and every sums and sum of money that are or is now due and owing to me from and by [*debtor*], of, &c. [*Or* all that debt or sum of £ , now due and owing to me from [*debtor*], of, &c., for goods sold and delivered by me to the said [*debtor*], as appears by the bill or account hereunto annexed signed by me. *Or* all moneys due and owing to me by virtue of the bill of exchange hereunto annexed, dated the day of , drawn by me upon, and accepted by the said [*debtor*], for the sum of £ , payable months after the date thereof, including as well the principal money mentioned in the said bill, as the interest, commission, and all other charges and expenses which shall have become due thereon, or have been incurred by the non-payment thereof. *Or* all moneys due and owing for principal, interest, and costs on the security of a mortgage dated, &c., and made between, &c.], and on receipt or payment thereof, or any part thereof, for me and in my name acquittances or other sufficient discharges for the same to make, sign, and deliver, and to do all other lawful acts and things in and about the premises, as effectually as I could do, if personally present; and whatsoever the said [*attorney*] shall do, or cause to be done, in or about the premises by virtue of these presents, I the above-named [*principal*] hereby agree to ratify and confirm [*power to be irrevocable*, p. 365].

IN WITNESS, &c.

VI. *POWER to RECEIVE a LEGACY, with Power to consent to an Abatement in case of a Deficiency of Assets; and, if required, to give a Bond to the Executors to Refund.*

Recital of will.

Testatum.

Power to receive legacy with interest.

To give receipt.

To consent to abatement.

TO ALL TO WHOM THESE PRESENTS SHALL COME [*principal*], of, &c., sends greeting: WHEREAS [*testator*], late of, &c., deceased, by his will dated, &c., and proved, &c., gave and bequeathed to the said [*principal*] the sum of £100, to be paid within the space of twelve months after his decease, and appointed [*executors*], of, &c., executors in trust of his said will: NOW THESE PRESENTS WITNESS, that the said [*principal*] hereby appoints [*attorney*], of, &c., his attorney, for him and in his name to demand and receive of and from the said [*executors*], or either of them, or any other person or persons whom it may concern, the said legacy or sum of £100 so as aforesaid bequeathed to the said [*principal*], together with any interest which may be due for the same, and upon payment of the same legacy and interest to give an effectual receipt and discharge for the same; and in case it shall be proved to the satisfaction of the said [*attorney*], that the estate of the said [*testator*] is inadequate to the payment in full of the said legacy, in a due course of administration thereof, then to accept such sum or sums of money in satisfaction

To give
bond to
refund.

To bring
suits.

To defend
suits.

To submit
to arbitra-
tion.

General
words.

and discharge of the same legacy, as the said attorney shall be of opinion ought to be paid thereon; And also for and in the name and as the act and deed of the said [*principal*], if the said attorney shall think proper, and he shall be required so to do, to execute any bond or covenant for the repayment of the said legacy, or of a due proportion thereof, in case the estate and effects of the said [*testator*] shall subsequently to the payment thereof prove insufficient to discharge the debts of the said [*testator*], and also the legacies bequeathed by his said will, in the same rate and proportion as the said legacy shall have been paid; and upon non-payment of the said legacy or sum of £100, or any part thereof, or of any interest due in respect thereof, for or in the name of the said [*principal*], to commence and prosecute any such action or other proceeding for the recovering payment of the same legacy, or any part thereof, as the said [*attorney*] shall think proper; And also to appear for the said [*principal*] to any action or other proceeding that shall or may be instituted touching the administration of the estate and effects of the said [*testator*], in which the said [*principal*] shall be made defendant, and to defend the same, and generally to take and concur in such proceedings in regard to any such action as the said [*attorney*] shall deem expedient; And also to submit any matter or matters connected with the claim of the said legacy, or the administration of the estate of the said [*testator*], to arbitration, and in the name of the said [*principal*] execute and enter into any bond or bonds, covenant or covenants, to abide by and perform the award; And generally to do, perform, and execute all matters and things in and about the premises, as fully and effectually as the said [*principal*] might or could have done if personally present. [*Power to appoint substitutes, agreement to ratify, power to be irrevocable*, pp. 364, 365.]

IN WITNESS, &c.

VII. *POWER by an EXECUTOR residing Abroad to prove a Will in this Country.*

IN THE HIGH COURT OF JUSTICE.

PROBATE DIVISION.

Recitals:
Testatum.
Appoint-
ment of
attorney.

TO ALL TO WHOM THESE PRESENTS SHALL COME [*principal*], late of, &c., but now residing at _____, in the kingdom of Italy, sends greeting; WHEREAS [*recite will appointing principal to be executor, and death of testator*]: NOW THESE PRESENTS WITNESS that the said [*principal*] hereby appoints [*attorney*], of No. _____, Lincoln's Inn Fields, London, solicitor, to be the attorney of the said [*principal*], for him, and in his name, or otherwise to appear before the Probate Division of His Majesty's High Court of Justice, or before some other Court or judge of competent jurisdiction, and to apply for and procure letters of administration with the said will annexed, of the personal estate of the said [*testator*], deceased, to be granted and committed to him, but, nevertheless, for my use and benefit, and until I shall apply for and procure probate of the said

will to be granted and committed to me ; AND, for that purpose, to execute such bond, covenant, or other obligation as shall be required upon the grant of such letters of administration as aforesaid ; AND GENERALLY, for me, and in my name, and on my behalf, to do, perform, execute and accomplish every other act, deed, matter, and thing whatsoever, which my said attorney shall think necessary or proper to be done, for the purposes aforesaid, during my absence from England, as fully and effectually as I might or would do if personally present. [*Power to appoint substitutes, and agreement to ratify*, ante, p. 364.]

IN WITNESS, &c.

VIII. *POWER by TRUSTEES for Sale of an Estate in Jamaica, to certain Merchants resident there, to enter upon and dispose of the Trust Property pursuant to the Trusts of the Deed, which contained an express Authority to appoint Attorneys for the Purpose.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [A. B.], of, &c., and [C. D.] and [E. F.], both of, &c., send greeting : WHEREAS, by an indenture dated, &c., and made between [P. Q.], of the first part ; [R. S.], of the second part ; and the said [*principals*], of the third part ; all that plantation and sugar-work, called by the name of _____, and the lands thereunto belonging, situate in the parish of, &c., in the island of Jamaica, and all mills, mill-houses, boiling-houses, curing-houses, still-houses, and all other edifices and buildings on the said plantation and lands, or any part thereof erected, and also all and every the horses, mules, cattle, and other live stock, coppers, stills, worms, worm-tubs, ladles, skimmers, drips, pots, pans, wains, waggons, plantation-utensils, and implements for planting, upon and belonging to the said plantation and sugar-work, with the appurtenances, were conveyed and assured unto and to the use of the said [*principals*], their heirs and assigns ; UPON TRUST that they, the said [*principals*], or the survivors or survivor of them, or the heirs of such survivor, should concur with all proper parties in selling the said hereditaments and premises, either together or in parcels, by public auction, or private contract, for such price or prices as could be reasonably obtained for the same ; and should, upon payment of the purchase-money or purchase-moneys, concur with all proper parties in assuring the said hereditaments and premises, or such part or parts thereof as should be so sold, and the fee-simple thereof respectively, to the purchaser or purchasers, his, her, or their heirs and assigns ; and should, in the meantime, and until such sale or sales should be made as aforesaid, receive and take all the rents, profits, and produce of the said premises, and should dispose of the money arising from such sale or sales, and from the said rents, profits, and produce, as in the said indenture of release mentioned ; and it was thereby declared, that the receipt or receipts in writing of the said [*principals*], or the survivors or survivor of them, or the heirs or assigns of

Recital of conveyance in trust for sale.

Receipts by trustees, or their attorneys, to discharge purchasers.

Power to
nominate
attorneys, to
carry into
execution
the trusts of
the deed.

Testatum.

Appoint-
ment of
attorneys—

To enter
upon plan-
tation, &c.

To manage
same, and
remit pro-
duce.

To receive
and recover
rents and
produce.

To give
receipts.

To pro-
secute or
defend
actions.

Also to
carry into
execution
the trusts of
the recited
indenture.

such survivor, or their or his attorneys or attorney, should be a sufficient discharge or sufficient discharges to the said purchaser or purchasers, who should not be liable to see to the application of the purchase-money, which in and by such receipt or receipts should be acknowledged to be received : AND in order to facilitate such sale or sales as aforesaid, it was by the said indenture expressly declared and agreed, that it should be lawful for the said [*principals*], and the survivors and survivor of them, and the heirs of such survivor, from time to time as occasion should require, to nominate and appoint by writing under their or his respective hands and seals, or hand and seal, one or more attorney or attorneys in Jamaica, for the purpose of joining in such sales as are thereby authorised and directed, and for carrying into execution the said trusts thereby created : NOW THESE PRESENTS WITNESS, that the said [*principals*], as such trustees as aforesaid, Do, and each of them Doth, by these presents, constitute and appoint [*three attorneys*], of, &c., or any two or one of them, jointly and severally to be the attorneys and attorney of them the said [*principals*], as such trustees as aforesaid, and of the survivors and survivor of them, for and in the names or name of them the said [*principals*], as such trustees as aforesaid, or the survivors or survivor of them, to enter upon, and by all lawful means take possession of the said plantation and sugar-work, cattle, stock, plantation-utensils, and implements of planting, lands, tenements, and hereditaments, and the same to order, manage, and cultivate, and to receive and take the rents, profits, and produce thereof, and the same to ship and remit to Great Britain, or otherwise dispose of as they the said [*principals*], or the survivors or survivor of them, shall from time to time direct ; And also for and in the names or name of them the said [*principals*], as such trustees as aforesaid, or the survivors or survivor of them, to ask, demand, recover, and receive all and every sums and sum of money, debts, dues, claims, and demands whatsoever, in the said island of Jamaica, which now are or is, or hereafter shall be due, owing or belonging unto them the said [*principals*], as such trustees as aforesaid, or the survivors or survivor of them, in respect, or on account of the rents, profits, and produce of the said plantation and sugar-work, lands, tenements, hereditaments, and premises ; And upon receipt thereof, or of any part thereof, to give and execute receipts, releases, or other sufficient discharges for the same ; And on non-payment thereof, or of any part thereof, to sue for the same, and to levy, maintain, and take all such legal and proper executions, suits, and means, for recovery thereof, as may be necessary ; [And also to appear for them the said [*principals*], or the survivors or survivor of them, and them or him to represent in any Court or Courts of law or equity in the said island of Jamaica, and there to answer and defend any action or actions, suit or suits, brought or to be brought against them or any of them touching or concerning the premises]. AND the said [*principals*], as such trustees as aforesaid, Do, and each of them Doth, hereby further authorise and empower the said [*attorneys*], or any two or one of them, for and in the names or name of them

To sell
plantation,
&c.

And exe-
cute con-
veyances.

To give
receipts for
purchase-
money.

General
words.

Covenant
to ratify.

the said [*principals*], as such trustees as aforesaid, or the survivors or survivor of them, to carry into execution the several trusts in them or him expressed to be reposed by the said indentures of lease and release, and for that purpose to sell and dispose of and concur with all proper parties in making sale and disposal of the said plantation and sugar-work, horses, mules, cattle, stock, lands, tenements, hereditaments, and premises, comprised in the said indentures of lease and release, either together or in parcels, and by public auction or private contract, to any person or persons, for such price or prices as can be reasonably had for the same; And also for them the said [*principals*], as such trustees as aforesaid, or the survivors or survivor of them, in their or his names or name, to sign, seal, and deliver all such conveyances and other deeds and assurances as shall be requisite for conveying and assuring the said plantation and sugar-work, horses, mules, cattle, stock, lands, tenements, hereditaments, and premises, with their and every of their issue and appurtenances, or such part or parts thereof as shall be so sold, and all the estate, right, and interest of them the said [*principals*] therein or thereto, unto the respective purchaser or purchasers of the same, his or their heirs and assigns, or as such purchaser or purchasers shall reasonably require, and sign and give to such purchaser or purchasers an effectual receipt or effectual receipts, for his or their purchase-money or respective purchase-moneys: And generally to do, perform, and execute all other acts and things which shall be requisite in or about the premises, as fully and effectually as they the said [*principals*], or the survivors or survivor of them, might or could do if personally present; they the said [*principals*] hereby agreeing to ratify and confirm whatsoever the said [*attorneys*], or any one or more of them, shall do or cause to be done in or about the premises by virtue of these presents.

IN WITNESS, &c.

IX. *POWER from a PERSON having large Estates in England, previously to his going Abroad, containing very Extensive and Special Powers to Demise and Manage Estates, appoint Bailiffs, exercise Powers of Entry, &c., in Leases, Proceed against Tenants, &c.; collect Rents, settle Debts, bring Actions, refer to Arbitration, Sell, Mortgage, or Charge the Estates in Great Britain, and in Saint Vincent, and Grant Annuities and otherwise to act in his Concerns.*

TO ALL TO WHOM THESE PRESENTS SHALL COME,
I, [*principal*], late of the island of Saint Vincent, but now of _____, in the county of _____, in England, esquire, send greeting:
WHEREAS I, the said [*principal*], am seised and possessed of or otherwise entitled to certain freehold and leasehold farms, lands, and hereditaments, and other personal estate and effects in England, and several persons residing in England are indebted to me in various

Recitals

Testatum.

Appoint-
ment of
attorney.

To let
estates and
grant
leases.

To enter by
virtue of
powers in
leases.

To deter-
mine leases.

To receive
rents.

And all
other debts
and effects.

To give
discharges.

In case
of non-
payment of
rent to
distrain.

sums of money : AND WHEREAS I am now about to leave England and to reside in _____, and am desirous of appointing a proper person as my attorney, with such powers and authorities as may be necessary or convenient for enabling him, during my absence from England, to manage and conduct my property and affairs as effectually as if I were personally present : NOW THEREFORE KNOW YE, that, for effectuating the purpose aforesaid, I, the said [*principal*], hereby appoint [*attorney*], of, &c., esquire, my attorney for me, and in my name and on my behalf, to take possession of, let and demise, or, if he shall think proper, to keep in his own hands, manage, cultivate, and improve my freehold and leasehold messuages, farms, lands, and hereditaments, in _____ and elsewhere in Great Britain, and from time to time to appoint any bailiff, stewards, or agents, to assist him in managing the same, with such salaries or allowances as he shall think reasonable ; and from time to time to displace or remove the persons so appointed, or any person or persons now acting in any such capacity or capacities, and another or others to appoint ; and also for the purposes aforesaid, or any of them, in my name and on my behalf, to execute and do all such assurances and things as he my said attorney shall think expedient for granting, demising, or letting all or any of the said freehold and leasehold messuages, farms, lands, and hereditaments, in consideration of any fine or fines or without fine, and under and subject to such conditions, rents, covenants, and agreements, as my said attorney shall think fit ; AND ALSO by virtue of any powers reserved to me in and by any leases under which the said premises may from time to time be held, or otherwise, to enter into and upon the said premises or any part thereof, to view and examine the state and condition thereof, and give the proper notices and directions respecting the repairs and cultivation of the same ; or, if my said attorney shall deem expedient, by entry or otherwise wholly to determine and make void any such lease or leases by virtue of any power or powers therein contained, and generally to exercise all or any other powers, rights, and privileges, reserved to me in and by any such leases ; AND ALSO from time to time, for me and in my name or otherwise, to receive and recover all the rents and profits which now are or hereafter shall be due, owing, or arising for or in respect of my said freehold and leasehold estates in Great Britain (making such allowances and deductions thereout as may lawfully or reasonably be claimed) ; AND ALSO all other sums of money, securities for money, legacies, debts, goods, chattels, and personal effects and things whatsoever, to which I am now or hereafter shall be entitled ; and upon receipt or delivery of the said rents, arrears of rent, issues and profits, sums of money, debts, legacies, goods, chattels, effects, and things, or any of them, or any part or parts thereof respectively, to give sufficient receipts for the same ; AND in case of non-payment of all or any part or parts of the said rents, arrears of rent, issues and profits, or the non-payment or non-delivery of all or any of the said sums of money, debts, legacies, goods, chattels, effects, and things, or any part or parts thereof respec-

tively, for me and in my name, or otherwise, to enter and distrain for all or any part of the said rents, or arrears of rent, and to commence such actions or suits at law or in equity, or other proceeding or proceedings, as my said attorney shall deem proper to compel the payment or delivery of all or any of the said rents, arrears of rent, issues and profits, sums of money, debts, legacies, goods, chattels, effects, and things, or any part or parts thereof respectively or to enforce the performance of any covenant or covenants contained in any indenture of lease, granted or to be granted, of my said estates, or any part thereof, or to recover possession of the said estates or any part thereof; and the same actions or suits respectively to prosecute or to discontinue, and become non-suit or otherwise to act therein as my said attorney shall deem expedient; AND ALSO to state and finally settle and adjust all accounts, reckonings, and demands whatsoever, between me and any person or persons whomsoever, and to receive the balance or balances thereof, if any; And upon settling or adjusting such accounts respectively, and payment of such balances, acquittances, releases, and other discharges, from time to time to make, execute, and give for the same respectively; And in case of refusal or non-payment of all or any part or parts of any balance or balances that shall happen to be due to me, to compel the payment thereof by all or any of the ways or means aforesaid; And also, in case any person or persons who is, or are, or shall be indebted to me, shall become a bankrupt or bankrupts, to prove such debt or debts and receive the dividend or dividends payable in respect thereof; and for me and in my name, or otherwise, to sign the certificate or certificates of any such bankrupt or bankrupts; And also to compound, compromise, and submit to arbitration and adjust all debts, claims, demands, and disputes subsisting or to arise between me and any other person or persons whomsoever; And for that purpose to execute and do all such instruments and things as the said [attorney] shall think expedient; AND ALSO to appear for me the said [principal] in any Court of law or equity to any action, bill, suit, information, or complaint, that is or shall be brought, commenced, or prosecuted against me, or whereunto I shall be a party, and to defend the same, or therein to suffer judgment or decree to be had, given, taken, or pronounced against me by default or otherwise, as my said attorney shall think proper; And also, for me and in my name, or otherwise, and on my behalf, to enter into any agreement with any person or persons to whom I am or shall be indebted, touching the payment or liquidation of his or their debt or respective debts, or any part thereof respectively; And to execute and give to any such person or persons any security or securities, real or personal, on any part of my estate and effects in Great Britain, for the payment of his or their debt or respective debts, or any part or parts thereof respectively [either with or without interest, by instalments or otherwise, at such time or respective times, and] under and subject to such terms, conditions, stipulations, and agreements of any nature soever, as my said attorney shall think reasonable or proper; And also, for me and on my behalf,

And commence actions for rents or other moneys.

To settle accounts.

And recover balances.

To prove debts in bankruptcy.

To compound debts and refer to arbitration.

To appear to and defend actions.

To make arrangements with creditors.

And give security for debts.

To borrow moneys.

To give bills, bonds, and warrants of attorney, &c., for moneys due.

And to mortgage or sell real and personal estate.

To execute mortgages and conveyances.

To give receipts for purchase-moneys and moneys borrowed.

Out of monies received, in the first place to pay expenses;

And then to pay debts.

To keep down interest.

to borrow and take up at interest, upon any security, real or personal, any sum or sums of money my said attorney shall think proper; And for the purpose of securing any debt or debts, or sum or sums of money now due or owing, or hereafter to become due or owing from me to any person or persons, either with or without interest for the same as aforesaid, or any such sum or sums of money so to be borrowed or taken up at interest as aforesaid, or for any other purpose which my said attorney shall think expedient, for me and in my name to sign, make, indorse, or accept any promissory note or notes, or bill or bills of exchange, and enter into, sign, seal, execute, and deliver any covenant or covenants, agreement or agreements, bond or bonds, or warrant of attorney or warrants of attorney for confessing judgment against me in any Court or Courts in Great Britain; And to mortgage, charge, or otherwise incumber, all or any part or parts of my freehold and leasehold plantations, lands, and tenements, stock, chattels, and real and personal estate and effects whatsoever, in Great Britain; And also if, and when, and so soon as my said attorney shall think expedient, for me and on my behalf, to sell and absolutely dispose of all or any of my freehold and leasehold estates, goods, chattels, and effects in Great Britain (whether the same shall have been previously mortgaged or not), together, or in parcels, and either by public auction or private contract, for such price or prices, as to my said attorney shall seem reasonable, and to convey, assign, transfer, or make over the same respectively to the purchaser or purchasers thereof [with power to give credit for the whole or any part of the purchase-money thereof, and to permit the same to remain unpaid for such time and upon such security as my said attorney shall think proper]; And for all or any of the purposes herein mentioned, for me and in my name, and as my act and deed, to execute and do all such mortgages, conveyances, assurances, and things as shall be required, and as my said attorney shall think proper; and for me and in my name sign and give receipts for all or any the sum or sums of money which shall arise from any such sale or sales as aforesaid, or which shall be so borrowed as aforesaid, by virtue of the powers hereinbefore contained, which receipts shall be sufficient discharges to the persons paying the same, and shall exempt them from all responsibility in respect of seeing to the application thereof; And by, and with, or out of such moneys as shall from time to time come to the hands or power of my said attorney, under or by virtue of any of the powers or authorities aforesaid, to pay and discharge, in the first place, all the expenses of preparing, engrossing, and executing these presents, and all other costs, charges, damages, and expenses which my said attorney shall pay, sustain, incur, or become liable to, in or about the execution of the powers vested in or given to him by these presents, or in anywise relating thereunto; And, in the next place, to pay and discharge any debt or debts which is, or are, or shall, or may be due and owing from me, or such of them or such part thereof as my said attorney shall think proper, or to apply the same, or such part thereof as he in his discretion shall think necessary, in or

for the keeping down and discharging the interest due or to grow due on any securities given or hereafter to be given by me or by my said attorney by virtue hereof; And also, for such other purposes, and in such other manner, as I shall from time to time, by any writing under my hand, direct or appoint, or otherwise to dispose of the same for my use and benefit as he shall think fit:

Recital that principal is indebted to A.

AND WHEREAS I am indebted to [creditor], of, &c., in the sum of £ , or thereabouts, for which he has accepted my bond, payable by instalments, and taken certain other securities for the payment of the same: AND WHEREAS the arrangement of my affairs might be materially facilitated if a sum of money could be raised by way of mortgage for the payment of the said debt of the said [creditor], or any part or parts thereof; Now I do hereby particularly authorise and empower my said attorney to raise by way of mortgage, any sum of money not exceeding the amount of the sum of £ , for the purpose of paying off and satisfying the said debt of the said [creditor], or such part thereof as may be thought expedient by my said attorney; And thereupon, for me, and in my name and on my behalf, to execute any mortgage or charge, mortgages or charges, and any conveyance or assurance, or conveyances or assurances, of all or any part or parts of my estate or effects, real or personal, with such clauses, agreements, conditions, and covenants, to be therein contained, as the mortgagee or mortgagees shall require, for securing the payment of the said annuity or annuities; And I hereby declare, that the receipts of my said attorney, for all or any part of the moneys which shall form the consideration of the said mortgages or charges, or any of them, shall be good and complete discharges, to the mortgagee or mortgagees, who shall pay the same, And that he or they shall in no respect be responsible for the application thereof; And generally, for me, and in my name, and on my behalf, to do, perform, execute, and accomplish every other act, deed, matter, and thing whatsoever, which my said attorney shall think necessary or proper to be done in or about or concerning my estates, property, debts, concerns, or engagements, during my absence from England, as fully and effectually as I might or could do if personally present. [*Power to appoint substitutes, agreement to ratify, power to be irrevocable, ante, pp. 364, 365.*]

Power to raise money by way of mortgage to pay debt due to A.

Receipts of attorney to be good discharges.

Attorney to perform all other necessary acts respecting property and concerns of constituent.

X. *POWER by TWO MERCHANTS, being in England, to their Partner in the United States of America,¹ to act for them in all Partnership Transactions.*

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME [first principal], of, &c., and [second principal], of, &c., send greeting:

¹ Where a power is intended to be used in the United States, the person executing it should attend at the Office of the Consulate, where the execution will be duly authenticated; but if this be impracticable, the party should execute the power in the presence of a notary public and two other persons, and the notary will attest it by an act in the usual way. The papers should then be taken to the Consulate Office of the States (at the nearest port), where the necessary authentication of the notary's act may be obtained.

And give receipts.
To bring or defend actions.

To compound debts.

And submit disputes to arbitration.

General words.

To appoint a substitute.

Agreement to ratify.

and receive of and from all and every the persons and person liable to pay the same, all debts and sums of money, goods, property, and effects, which now are or may hereafter become due and owing or belonging to the said partnership, or to the said [*principals*], or either of them, on account thereof ; And upon receipt of any such sum of money to give a sufficient receipt for the same : And also to commence and prosecute any actions, suits, or other proceedings, against any person or persons in respect of any of the matters or things aforesaid, or any other matter or thing relating to the concerns of the said partnership business ; and to appear to or defend any actions, suits, or other proceedings to be commenced or prosecuted against the said partnership, and to proceed to judgment and execution, or become nonsuit, or suffer judgment to go by default, in any such actions, suits, or other proceedings, or to compromise the same, as to the said [*attorney*] shall seem most expedient ; And also to compound for any debt or debts now due or hereafter to become due to them the said [*principals*], and to accept part thereof in discharge of the whole, if he shall see occasion so to do ; And to submit any dispute or disputes now depending, or which may hereafter arise, touching any of the dealings or transactions on the estates, property, or effects of the said partnership, to arbitration, and execute any bond or covenant to abide by and perform the award which shall be made thereon ; And also to do, perform, and execute all such other acts, deeds, and things as may be requisite or necessary in or about the premises ; And generally to act in the management, conduct, arrangement, and superintendence of all the concerns, affairs, and business whatsoever of the said partnership in the United States and West Indies, as fully and effectually as the said [*principals*], or either of them, could do if personally present ; And also to substitute or appoint any person or persons to act under or in the place of the said [*attorney*] in all or any of the matters aforesaid, and such substitute and substitutes at pleasure to remove, and another or others to appoint, the said [*principals*] hereby agreeing to ratify and confirm whatsoever the said [*attorney*], or his substitute or substitutes shall do or cause to be done in or about the premises, by virtue of these presents.

IN WITNESS, &c.

XI. *POWER by UNDERWRITERS at Liverpool to act for them in London.*

KNOW ALL MEN BY THESE PRESENTS that [A. B.] and [C. D.], both of Liverpool, in the county of Lancaster, underwriters and co-partners, carrying on their business in Liverpool and in the City of London, under the firm or style of "The Marine Insurance Company," do, and each of them doth, hereby constitute and appoint [F. G.] and [H. I.], both of Lloyd's, Royal Exchange, London, underwriters, insurance brokers, and co-partners, and each of them to be the attorneys and agents, and attorney and agent, of them the said

Appointment of attorneys.

[A. B.] and [C. D.], in the City of London, in the names or name, and as the acts or act of the said [A. B.] and [C. D.] as such partners as aforesaid, by their said firm or style of "The Marine Insurance Company," or of the said [A. B.] and [C. D.], or either of them individually, or otherwise, to carry on and conduct the said business of the said firm, and to employ agents, clerks and servants in and for any of the purposes of the said business, and to dismiss any person or persons now or hereafter to be so employed, and in and for any of the purposes of the said business to make and enter into, and to rescind or vary upon such terms and conditions as the said [*attorneys*], or either of them, shall think fit, or otherwise, any contracts of marine insurance and any contracts relating to any ships, goods or freight, which may be abandoned or given up to, or be claimed by the said firm in their said business, and to enter into and do any other contracts, acts or things, whatsoever incident to the business of underwriters and marine insurers for the said firm in London; AND ALSO to examine, adjust, and settle all losses, claims, demands, accounts and reckonings between the said firm and any other person or persons, whether as insured, or as salvors or otherwise, in respect to the said business; And to pay or receive (as the case may require) any moneys which may appear to be due on the settlement of any such losses, claims, demands, accounts and reckonings; AND ALSO to ask, demand, and receive, and, if necessary, sue for and recover from whomsoever it may concern all sums of money, ships, goods, property, and effects whatsoever, which are or shall be due or owing or belonging to the said firm, or the said [A. B.] and [C. D.], or either of them, on account of their said underwriting business, and on receipt or delivery thereof to give effectual discharges for the same; AND ALSO to compound for any debts or sums of money due to or claimed from the said firm; AND ALSO to commence and prosecute any actions or other proceedings against any person or persons in respect of any of the matters or things aforesaid, or any other matter or thing relating to the conduct, business, contracts, dealings, transactions, or affairs of the said firm, and to appear to and defend any actions or other proceedings commenced, or to be commenced, against the said firm or the said [A. B.] and [C. D.], or either of them, in respect of any of the matters or things aforesaid, or any other matter or thing relating to the conduct, business, contracts, dealings, transactions, or affairs of the said company, and either to proceed to judgment and execution, or to become nonsuit, or to suffer judgment to go by default in any such actions or other proceedings as aforesaid, or to confess or compromise the same, or otherwise deal therein as shall seem most expedient; AND ALSO to submit any disputes or questions which may arise in relation to the conduct, business, contracts, dealings, transactions, or affairs of the said firm to arbitration, and for that purpose to execute any bonds or covenants of submission, and for any of the purposes before mentioned to make, underwrite, execute, sign, seal, and deliver any contracts, policies, agreements, deeds, assurances, instruments, and writings

To carry on
business
in London.

To adjust
losses.

To recover
property.

To give
receipts.
To com-
pound.
To bring
and defend
actions.

To submit
to arbitra-
tion.

To execute deeds, &c. whatsoever; And for any of the above purposes to make, enter into, underwrite, execute, and sign any contracts, agreements, policies, deeds, assurances, releases, receipts, instruments, and writings whatsoever, which the said [*attorneys*], or either of them may think necessary or expedient; And generally to act in the management and conduct of all the affairs and concerns of every kind and description in any manner relating to or connected with the said business of the said firm, and to use and pursue all such ways and means, and make, do, and execute all such acts, matters, and things as may be requisite or expedient for that purpose, as fully and effectually as the said [A. B.] and [C. D.], or either of them, could or might do if personally present; AND ALSO to substitute any person or persons to act under, or in the place of, the said attorneys or attorney in all or any of the matters aforesaid, and every such substitution to revoke, the said [A. B.] and [C. D.], and each of them, hereby agreeing to ratify and confirm whatsoever the said attorney or attorneys, or their or his substitutes or substitute, shall lawfully do, or cause to be done, in or about the premises by virtue or according to the intent and meaning of these presents.

General words.

Power to substitute.

Agreement to ratify.

IN WITNESS, &c.

XII. *POWER OF ATTORNEY empowering a CREDITOR to receive the Rents of Freehold Houses, by way of Security for a Loan.*

THIS INDENTURE, made the day of ,
Parties. BETWEEN [*principal*], of, &c., of the one part; and [*creditor*] of, &c.,
Recitals. of the other part: WHEREAS the said [*principal*] is seised of, or entitled to two several messuages, situate in Street, in the parish of , in the county of , being Nos. and in the said street, for one estate in fee simple in possession free from incumbrances, which said several messuages have been let by the said [*principal*] to the several persons, and at the several yearly rents following, that is to say, No. , in Street aforesaid, to [A. B.], as tenant from year to year, at the yearly rent of £ ; and No. , in Street aforesaid, to [C. D.], by an indenture of lease, dated the day of 19 , for twenty-one years from the day of 19 , at the yearly rent of £ : AND WHEREAS the said [*creditor*] has agreed to lend to the said [*principal*] the sum of £ , at interest, on the security of the rents of the said two several messuages, to be received by him the said [*creditor*] as hereinafter expressed: NOW
Testatum. THESE PRESENTS WITNESS, that, in pursuance of the said recited agreement, and in consideration, &c., the said [*principal*] hereby irrevocably appoints the said [*creditor*], his executors or administrators, the attorney and attorneys of him the said [*principal*], for him and in his name or otherwise to receive and recover from the tenants and occupiers of the said two messuages respectively, ALL
Appoint- ment of attorney. TO receive the rents. THOSE several yearly rents of £ and £ , so respectively

To give
receipts.

To distrain.

To substi-
tute.
Agree-
ment to
ratify.

Declaration
of trusts of
moneys.

To pay
rates and
outgoings.
To retain
mortgage-
moneys and
trust-
expenses.

To pay
over
balance.

Covenants
by prin-
cipal to
repay
mortgage-
moneys.

And not
to hinder
attorney
from
receiving
rents.

reserved and made payable to the said [*principal*] out of, or in respect of, the same messuages; And all moneys now due, or hereafter to become due, in respect of the same rents or either of them, and to give effectual discharges for the same, exonerating the persons paying such rents respectively from all responsibility in respect of the application thereof; and, for the purposes aforesaid, to levy and make such distresses and entries upon the said premises, and to do and execute all such other acts, matters and things as may be expedient for compelling and enforcing payment of the said rents, and to appoint, from time to time, a substitute or substitutes for all or any of the purposes aforesaid, and from time to time every such substitution at pleasure to revoke; the said [*principal*] hereby agreeing to ratify and confirm whatsoever the attorney or attorneys, or his or their substitute or substitutes, shall lawfully do, or cause to be done, in or about the premises: AND IT IS HEREBY DECLARED AND AGREED that the said [*creditor*], his executors, administrators, and assigns, shall stand possessed of the said rents and moneys so to be received by him and them as aforesaid, UPON TRUST thereout, in the first place, to pay the rates and other outgoing which shall, from time to time, be payable in respect of the said premises; And, in the next place, UPON TRUST, from time to time to retain to and reimburse himself and themselves the said sum of £ advanced by the said [*creditor*] to the said [*principal*] as aforesaid, with interest thereon at the rate of per cent. per annum from the date hereof to the time or respective times of the repayment of the same; And after full payment and satisfaction of the said principal and interest moneys, and of all costs and expenses attending the execution of this present trust, UPON TRUST, to pay over unto the said [*principal*], his executors, administrators, or assigns, any moneys which shall remain in the hands of the said [*creditor*], his executors, administrators, or assigns, unapplied to the purposes aforesaid. AND IT IS HEREBY DECLARED AND AGREED that when the said principal and interest moneys, costs, and expenses shall have been fully satisfied, the said [*creditor*], his executors or administrators, on the request of the said [*principal*], his executors, administrators, or assigns, shall deliver unto him or them this present power of attorney to be cancelled. And the said [*principal*] hereby covenants with the said [*creditor*], to pay unto the said [*creditor*], his executors or administrators, or assigns, on the day of next, the sum of £ , with interest for the same in the meantime at the rate of per cent. per annum: And also, that he the said [*principal*], his executors or administrators, so long as any principal moneys shall remain owing, by virtue of these presents, will pay to the said [*creditor*], his executors, administrators, or assigns, interest for the same at the rate aforesaid, by equal half-yearly payments on the day of and the day of in every year; And that the said [*principal*], his executors or administrators, will not prevent or hinder the said [*creditor*], his executors or administrators, from receiving the rents and moneys so to be received by him or them as aforesaid, but will, on the request of the said

For further
assurance.

[*creditor*], his executors or administrators, and at the cost of him the said [*principal*], his executors or administrators, make, do, and execute all such further acts, deeds and authorities as shall be requisite for authorising and empowering the said [*creditor*], his executors or administrators, to receive the said rents and moneys, so long as any part of the principal sum intended to be hereby secured, or of the interest thereon, shall remain owing to him or them, as by the said [*creditor*], his executors or administrators, shall be reasonably required.

IN WITNESS, &c.

XIII. *POWER to RECEIVE the FREIGHT of a SHIP.*

KNOW ALL MEN BY THESE PRESENTS, that I [*master*], of, &c., master and part owner of the ship or vessel called the _____, of the burthen of _____ tons, or thereabouts, do hereby appoint [*attorney*], of, &c., to be my attorney, for me and in my name, and for my use and the use of the other part owners of the said ship, to demand, receive, and recover of and from [*debtors*], of, &c., merchants, and any of them, and all other persons whom it shall or may concern, all and every sums and sum of money which now are or is due, owing and payable by and from them or any of them, as freight or otherwise, for or in respect of any goods or merchandise imported in the said ship in her late voyage from _____ to _____, by virtue of a charter-party dated the _____ day of _____ last, or otherwise howsoever; and upon receipt of all or any such sums or sum of money to give sufficient receipts and discharges for the same; I hereby agreeing to confirm whatsoever my said attorney shall do in or about the premises by virtue of these presents.

IN WITNESS, &c.

XIV. *POWER appointing TWO PERSONS jointly and severally as Substitutes, by virtue of an Authority in a Power of Attorney.*

TO ALL TO WHOM THESE PRESENTS SHALL COME [*principal*], of, &c., sends greeting: WHEREAS [*former principal*], of, &c., duly made and executed under his hand and seal a certain deed-poll or power of attorney, dated the _____ day of _____, whereby the said [*former principal*] appointed the said [*present principal*] his attorney, for him and in his name [*recite power, including the authority to appoint a substitute*]: NOW THESE PRESENTS WITNESS, that the said [*present principal*], by virtue and in execution of the authority in that behalf contained in the said power of attorney, and of all other authorities him thereunto enabling, doth hereby appoint [*two attorneys*], of, &c., and each of them, to be the attorneys and attorney, jointly and separately, of the said [*former principal*], for him and in his name, or in the name of the said [*present principal*], to execute and perform all and every the authorities, matters, and things mentioned and contained in the

said deed-poll or power of attorney, in the same manner, and as fully and effectually, as he the said [*former principal*], or as the said [*present principal*] might or could have done if personally present, and as they the said [*attorneys*], or either of them, might or could have done if they had been appointed the attorneys jointly and severally of the said [*former principal*], in and by the said deed-poll or power of attorney, in the stead of the said [*present principal*], the said [*present principal*] hereby agreeing to confirm whatsoever the said [*attorneys*] jointly, or either of them separately, shall do or cause to be done in and about the premises by virtue of these presents.

IN WITNESS, &c.

XV. DEED OF REVOCATION of a POWER of ATTORNEY.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [A. B.], of, &c., sends greeting: WHEREAS, by a certain deed-poll or power of attorney under my hand and seal, dated the day of _____, I appointed [C. D.], of, &c., my attorney, for me and in my name (*recite power*): NOW KNOW YE, that I, the said [*principal*], do by these presents absolutely revoke the said deed-poll or power of attorney, and every power and authority expressed to be thereby given: PROVIDED NEVERTHELESS, that nothing herein contained shall impeach or invalidate any act which the said [*attorney*] shall do or cause to be done by virtue of any power or authority expressed to be given by the said power of attorney, before the revocation thereof by these presents shall have been made known to the said [*attorney*].

IN WITNESS, &c.

XVI. DECLARATION of ATTESTING WITNESS to a Power of Attorney.

I, [A. B.], of, &c., do solemnly and sincerely declare, that on the day of _____ 19____, I and [*other witness*], of, &c., were present together and did see [*principal*], of, &c., sign, seal, and as his act and deed deliver, the power of attorney, hereunto annexed, and that the name [*principal's signature*] appearing to be subscribed thereto, as the name of the party executing the same, is of the handwriting of the said [*principal*], and that the names [A. B.] and [C. D.] respectively appearing to be subscribed thereto, as the names of the attesting witnesses to the execution of the said power of attorney, are of the respective handwritings of me the said [*declarant*] and the said [*other witness*]. AND I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Declared at _____, in the City of _____, [or Borough
of _____, in the County of _____], this _____ day
of _____ 19____, before me [X. Y.], Mayor [or Notary Public].

XVII. *CERTIFICATE of MAYOR or NOTARY verifying preceding Declaration.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*mayor*], Mayor of the City of _____, [*or Borough of* _____, in the County of _____, *or Notary Public by royal authority, duly admitted and sworn of* _____, in the County of _____], in pursuance of the Statutory Declarations Act, 1835, do hereby certify that, on the day of the date hereof, personally came and appeared before me [A. B.], of, &c., the person named in the declaration hereunto annexed, being a person well known and of good credit, and by declaration, which the said [A. B.] then made before me, did solemnly and sincerely declare and testify to be true the several matters and things mentioned and contained in the said annexed declaration.

In faith and testimony whereof, I the said Mayor have caused the seal of the office of Mayoralty of the said City [*or Borough*] of _____, [*or my notarial seal of office*], to be hereunto put and affixed, and the power of attorney mentioned in the said declaration to be hereunto annexed. Dated at the City [*or Borough*] of _____ aforesaid, the _____ day of _____ 19 ____.

X. Y., Mayor of _____

Power of the County.—See POSSE COMITATUS.

Powers.

TABLE OF CONTENTS.

Introductory	383	Donors	390
Technical Meaning	384	Donees—Disabilities	390
Classification	384	Repeated Exercise	391
Common Law and Statutory Powers and Powers to Appoint Uses and Trusts	384	Priorities of Limitations in Exercise of Powers	391
Powers simply Collateral, in Gross and Appendant	384	Relation of the Rule against Perpetuities to Powers	391
Powers, Administrative and Dispositive	385	Periods during which Powers may be Exercised	392
Powers, General and Special or Limited	385	How Powers should be Exercised	393
Powers to accomplish Particular Purposes	385	Execution of, Fraudulent	393
Distinction of General Powers from, and their Equivalence to, Property	386	Exercises Defective in Form: where Remedied	394
Power of Revocation	388	Exclusive and Illusory Appointments and Hotchpot Clauses	395
Suspension and Extinguishment or Release of Powers	389	Appointments of Parts of a Fund	395
Merger	390	Estates Appointed either Remainders or Executory Uses	395
		Powers to Appoint New Trustees	396
		Precedents	396

Introductory.—The subject of this article is that of the monumental works of Lord St. Leonards (8th ed., 1861) and Mr. Chance (1841), and

the more recent and very valuable treatise by the Lord Justice, Sir George Farwell, of which the second edition appeared in 1893, while the author was still at the bar. Here only the outlines of the subject and of its greater subdivisions can be drawn, and for most practical purposes the reader can in this article only be directed to others in this work, and generally to the above-mentioned authors, for answers to the questions with which he may need to grapple.

Technical Meaning.—The word “power” is used by conveyancers to denote an authority which one private person—technically called the donor—gives to another—technically called the donee. Every contract of agency, indeed, comprises the gift of a power, and one of the most formal modes of constituting an agent is that of giving him what is called a “power of attorney.” Powers of attorney and agency (see POWERS OF ATTORNEY and PRINCIPAL AND AGENT), however, are not treated of in this article, the subjects of which are powers to dispose of, or, in technical language, appoint, property or its subject-matter, and powers to appoint trustees of property.

Classification.—Powers to appoint property may be classified—(1) according to the parts of the law upon which they depend for their efficacy, as common-law authorities, statutory powers, powers to limit uses, and powers to declare trusts; (2) according to the circumstances of the donees, as powers simply collateral, powers collateral or in gross, and powers appendant; (3) according to the character of the purposes for which they are created, as dispositive and administrative; (4) according to the scope of the authority given, as general and special or limited; and (5) according to the particular acts they authorise, such as charges of rents for jointures or of gross sums for portions, appointments among members of a class, sales, leases, investments, and many other acts.

Common Law and Statutory Powers and Powers to Appoint Uses and Trusts.—Of the four classes of powers distinguished by the different parts of the law on which they are dependent, common-law authorities and statutory powers stand historically first and last in the series, but they are alike in operating, though they are conveyances, independently of uses and trusts. The usual illustration of a common-law authority is a declaration in a will that the testator’s executor may sell his land, which is sometimes found in very simple or inartificially drawn wills of freehold land, and more often in artificially drawn wills of copyhold land. It is with powers which operate on uses that the bulk of the old learning on powers is concerned; but powers which operate on trusts probably constitute the greater number of those now in existence. Many of them are in forms known as discretionary trusts. Statutory powers have been given by the Lands Clauses Consolidation Acts, 1845, Lord Cranworth’s Act, 1860, the Settled Estates Act, 1877, the Conveyancing and Law of Property Acts, 1881 and 1882, the Settled Land Acts, 1882 to 1890, the Copyhold Acts, the Land Transfer Acts, 1875 and 1897, and others. Though these powers are created by the legislature, yet, generally speaking, some private person confers them on others by giving to the latter interests or offices which make persons authorised by the Acts.

Powers Simply Collateral, in Gross and Appendant.—Powers simply collateral are powers to convey land or, perhaps (15 Ch. D. 232), other property, given to persons who have no estate or interest in that which they are empowered to convey. A common-law authority to sell land,

given to an executor, is such a power, as also were the powers of sale, etc., formerly conferred by real property settlements on the grantees to uses. Powers collateral or in gross—the latter being the epithet more frequently used—are powers given to persons having a limited estate or interest in some specified land to convey an estate or interest subsequent to their own in that land. Such are powers given or reserved to tenants for life to charge with jointure annuities for their widows, and with money for portions for their children, and, if the term be used of powers over personalty, the common powers given to parents to appoint the settled fund among their issue. Powers appendant are powers which an owner may exercise over property in which he takes an estate or interest, and so as to affect that estate or interest, and also, possibly, if his estate be a limited one, subsequent estates or interests. Powers of sale, exchange, partition, and leasing, when conferred on tenants for life, are appendant powers.

Administrative and Dispositive Powers.—The classification of powers as administrative and dispositive, though it may not have been largely recognised, is founded on a great difference between the purposes for which powers are created. Administrative powers are created in order to enable the donees to manage the subject of property upon which the powers are to be exercised for the benefit of the owners of that property, in some cases including, and in others not including, the donees of the powers. Dispositive powers enable the donees to determine partially or wholly the subsequent beneficial ownership of the property.

Powers, General and Special or Limited.—This classification distinguishes some dispositive powers from all other such powers. All administrative powers, however wide their scope, are limited by the duty of the donee in every case to exercise his power, not for his own benefit only, if he may do so at all, but for that of all the beneficiaries, including himself only if he be a beneficiary. A general power enables the donee to give the whole subject of the power to whomsoever he pleases, including himself, if it be made capable of exercise by act *inter vivos*. A special or limited power may differ from a general one in authorising the donee to give a limited estate or interest only, but the difference, which is usually connoted by the term special or limited, is that the power authorises disposition in favour of some specified person or persons or class of persons only. The peculiarities of a general power are further treated of below.

Powers to Accomplish Particular Purposes.—For accounts of the particular powers which are usually or frequently inserted in, or are now by statute imported into, settlements, reference must be made to the following articles in this work, that is to say, for Administrative Powers:—

Management of land,	} see SETTLED LAND ACTS.
Sale,	
Exchange,	
Partition,	
Enfranchisement,	
Leasing,	
Acceptance of surrenders of leases,	
Renewal of renewable leases,	
Grants of licences to demise,	
Mortgage,	

General Authorities to Trustees—

- | | |
|----------------------------------|---------------|
| To compromise debts, | } see TRUSTS. |
| To give receipts, | |
| To apportion blended funds, | |
| To invest in a specified manner, | |
| To employ and pay agents, | |
| To make charges for work done, | |

Dispositive Powers—

- | | |
|--|--|
| To appoint rent-charges for surviving spouses—when for widows called jointures, with ancillary powers, | } see SETTLED LAND ACTS. |
| To distrain, | |
| To enter, etc., | |
| To appoint for a term, | |
| To charge money for portions, | |
| To appoint the portions fund, | |
| To charge money for appointor himself, | |
| To appoint income to surviving husband for life, | } see POWERS IN SETTLEMENTS OF PERSONALTY. |
| To appoint settled fund among issue, | |
| To apply income during minority in maintenance and education, | |
| To apply capital for advancement, | |
| To appoint new trustees. See TRUSTS. | |

Distinction of General Powers from, and their Equivalence to, Property.
 —In order to understand the character of powers and their distinction from property, a distinction which has been recognised continuously for at least three centuries (*Sir Edward Clerke's Case*, 1599, 6 Rep. 17*b*; 77 E. R. 279; *Buckland v. Barton*, 1793, 2 Black. (H.) 136; Lord Eldon, C., 1804, 10 Ves. 255; 32 E. R. 842; *Ray v. Pung*, 1822, 5 Barn. & Ald. 561; *Ex parte Gilchrist*, 1886, 17 Q. B. D. 521, 530), the nature of a general power may be first considered. A general power is one whereby the donee can by any means dispose of all or any part of the property which is its subject for the benefit of any person or persons including himself (Butler, Note vii. 2 to Co. Litt. 271 *b*). Powers, however, which enable the donees to appoint for the benefit of whomsoever they will (*Sug. Pow.*, 8th ed., 394), or in any manner they think proper (*Wills Act*, 1837, s. 27), have the most essential characteristic of a general power, although the donees may not be authorised to exercise them otherwise than by will, and the following observations concerning general powers are applicable to powers of that description.

Powers made for administrative purposes merely, though authorising all dispositive acts, are not general powers in the above given sense of that term. They may be of common law or statutory character, and capable of exercise by way of limitation of uses or declaration of trusts. They may be appendant, in gross, or simply collateral.

The distinction between property and power is not, where the power is a general one, obvious to the common apprehension of mankind (*James, L.J.*, 1880, 16 Ch. D. 33), and the doctrine that, except in the

case of a wife's separate property, power to dispose is inseparable from ownership in perpetuity, tempts a leap to the converse proposition that an absolute power of disposition implies ownership. That proposition, however, is inexact. Present property entitles the owner to possession; but a general power does not, though its exercise may. In most cases, indeed, its exercise does, even though that exercise fail—as it may fail, for example, by the death before the appointor of an appointee under a will—to carry the property to the appointee (*Goodere v. Lloyd*, 1830, 3 Sim. 538; 57 E. R. 1100; 30 R. R. 214; *In re Van Hagan*, 1880, 16 Ch. D. 18; *Coxen v. Rowland*, [1894] 1 Ch. 406).

The difference is exemplified in many ways. Thus an obligation to pay money to such a person as A. shall appoint does not, if A. die, entitle his executor to demand payment (*Pease v. Mead*, 1613, Hob. 9; *Buckland v. Barton*, 1793, 2 Black. (H.) 136). A husband's general power to appoint land in fee does not entitle his widow to dower (*Ray v. Pung*, *ubi supra*), nor, it is conceived, does such a power in a wife entitle her surviving husband to an estate by the curtesy. Personalty, which a man at his death has a general power to appoint, is not part of his estate or assets for the payment of his debts (*Wright, L.K.*, 1704, 2 Vern. 465; 23 E. R. 898; *Holmes v. Coghill*, 1802, 7 Ves. 499; 32 E. R. 201; 6 R. R. 166; *Ashby v. Costin*, 1888, 21 Q. B. D. 401), nor, until 1860 (23 Vict. c. 15, s. 4), was it property in respect of which probate duty was payable. Moreover, a general power over, and an estate in fee simple in possession in the same land, may coexist in one person (*Maundrell v. Maundrell*, 1805, 10 Ves. 246; 32 E. R. 839; 7 R. R. 393).

A general power, however, is so nearly equivalent to property as to have led both judges and the legislature in several cases to treat such powers as they treat property. Thus, for the purpose of testing by the rule against perpetuities the validity of future interests appointed by the exercise of powers, the period permitted for vesting is, if the appointment be made under a special power, computed from the date of the creation of the power; if it be made under a general power, from the date of the appointment (*Sug. Pow.*, 8th ed., 394-396; *Rous v. Jackson*, 1885, 29 Ch. D. 521). In bankruptcy, unless the bankrupt be a wife (*Ex parte Gilchrist*, *ubi supra*), the property of the bankrupt divisible among his creditors includes the capacity to exercise a power which at the commencement of the bankruptcy he might have exercised for his own benefit (Bankruptcy Act, 1883, s. 44 (ii.)); and upon every death after August 1, 1894, property over which the person dying has at the time of his death a general power of appointment is property of which that person at the time of his death is competent to dispose, and so passes at his death as to entitle the Crown to estate duty (Finance Act, 1894, s. 2 (1a)).

The exercise of a general power, though in favour of persons other than the donee of it, makes the appointed property available after his death and after the exhaustion of his own personalty for the payment of his debts in preference to his appointees, unless they are purchasers for value (*Thompson v. Towne*, 1694, 2 Vern. 319; 23 E. R. 806; *Fleming v. Buchanan*, 1853, 3 De G., M. & G. 976; 43 E. R. 382); and that, it seems, they cannot be if the donee of the power can exercise it by will only (*Beyfus v. Lawley*, [1903] A. C. 411). The creditors in these cases are those of the appointor at his death (*In re Guedalla*, [1905] 2 Ch. 331). If the appointment be made by will, the appointor's executor or adminis-

trator is entitled to, and can give, an effectual receipt for the fund appointed (*In re Hoskins*, 1877, 6 Ch. D. 281; *In re Peacock's Settlement*, [1902] 1 Ch. 552), unless perhaps the interest capable of being appointed be one expectant on the determination of the life of a person who survives the appointor (*In re Dixon*, [1902] 1 Ch. 248). The doctrine is applicable where the donee of the power is a wife (*London Bank of Australia v. Lempriere*, 1873, L. R. 4 P. C. 572), and now, whatever may have been the law before 1883 (*Vaughan v. Vanderstegen*, 1854, 2 Drew. 363, 408; *Cotton, L.J.*, 1881, 17 Ch. D. 466; *In re Roper*, 1888, 39 Ch. D. 482), the Married Women's Property Act, 1882, s. 4, makes the subject appointed liable for her debts in the same manner as her separate property, even though the power be one capable of exercise by will only (*In re Ann*, [1894] 1 Ch. 549; *In re Hughes*, [1898] 1 Ch. 529). Moreover, interests created by testamentary exercises of such powers are charged with the payment of legacy duty (45 Geo. III. c. 28, s. 4; 8 & 9 Vict. c. 76, s. 4) and of succession duty (16 & 17 Vict. c. 51, s. 2), and the acquisition on a death of a general power confers a succession on the donee if and when he exercises it, the donor of the power being the predecessor (16 & 17 Vict. c. 51, ss. 4, 33); from 1860 until the imposition of estate duty (Finance Act, 1894), personal representatives were bound to account for and pay probate duty on property appointed by their testator under a general power (23 & 24 Vict. c. 15, s. 4), and since 1897 real estate over which a person exercises by will a general power of appointment devolves on his personal representative as if it were a chattel real (60 & 61 Vict. c. 65, s. 1 (1), (2), s. 25).

Formerly, conveyancers inserted general powers in ordinary purchase deeds as part of what were commonly called uses to bar dower, and in order to enable the purchaser without the concurrence of his wife to dispose of the estate free from her right to dower if she should survive him; but in consequence of the Dower Act, 1833, and the subsequent lapse of time that practice is now obsolete. Another use of such powers was in conveyances to women in order to enable them to dispose of their acquisitions independently of their husbands. The Married Women's Property Act, 1882, removed the need for that precaution. General powers, however, are still inserted in settlements, either in order to enable the donees to defeat the settlement, or to give an ultimate destination to the settled property. The most frequently occurring examples of the use of general powers for those purposes respectively are the joint powers to appoint the fee which are frequently given by re-settlements of land to two successive tenants for life and those which in a marriage settlement of an intended wife's property is usually given to her to dispose of the fund as she pleases, if she shall have no issue to take the property.

Power of Revocation is a term sometimes used to denote a power inserted in a settlement enabling the donee to determine it wholly or partially; but if the settlement be not made by the donee of the power, it may be more accurately called a power to determine. The insertion of such a power in a voluntary settlement is so far usual that its absence is a circumstance to be taken into account in deciding whether the deed ought to be sustained or set aside (*Turner, L.J.*, 1863, 3 De G., J. & S. 491); yet its insertion has been accounted a badge of fraud under 13 El. c. 5 (*Vaizey, Sett.*, p. 1529); it may, if the settlor become bankrupt, be exercised by the trustee in the bankruptcy for the creditor's benefit (46 & 47 Vict. c. 52, s. 56 (4)), and its existence leaves the property

settled chargeable with estate duty upon the death of the settlor (44 Vict. c. 12, s. 38, subs. 2 (a); 57 & 58 Vict. c. 30, s. 2, subs. 1 (c); *Att.-Gen. v. Earl Grey*, [1900] A. C. 124). The term, however, is most frequently used in powers to appoint to issue by deed in order to expressly authorise their exercise with or without power of revocation. Yet, in the exercise of a power without an express authority, a power of revocation and new appointment may be reserved (*Sug. Pow.*, 8th ed., 387), and if a power be made exercisable by several persons, such as a husband and wife, or by the survivor, they may on exercising it jointly authorise themselves or the survivor to revoke and appoint again (*Brudenell v. Elwes*, 1801, 1 East, 442; 6 R. R. 310; *In re Harding*, [1894] 3 Ch. 315). Revocation without new appointment revives the original trusts and powers (*Saunders v. Evans*, 1861, 8 H. L. 721). A power of revocation is not exercised by an appointment where there is other appointable property (*Pomfret v. Perring*, 1854, 5 De G., M. & G. 775; 43 E. R. 1071), or, though general in character, by a general devise or bequest made since 1837 (*In re Brace*, [1891] 2 Ch. 671).

Suspension and Extinguishment of Powers.—Much learning was formerly expended in discussing the question whether where a tenant for life made a lease out of or entirely disposed of his life estate, he did not suspend in the one case and extinguish in the other, powers conferred on him by the settlement together with his estate for life (*Sug. Pow.*, 8th ed., 51-82), but it is understood to be now settled that such alienations neither suspend nor extinguish the tenant for life's powers, though, being unable to derogate from his own grant, he cannot, after making any such lease or alienation, so exercise his powers as to affect the interest or estate he had previously created, without the consent of the owner of that interest or estate (*Alexander v. Mills*, 1870, L. R. 6 Ch. 124; *In re Beddingfield and Herring's Contract*, [1893] 2 Ch. 332; see also as to consent to exercise of powers to advance, *In re Cooper*, 1884, 27 Ch. D. 565; as to powers to appoint new trustees, *Hardaker v. Moorhouse*, 1884, 26 Ch. D. 417; and as to Settled Land Act powers, *In re Dickin and Kelsall's Contract*, [1908] 1 Ch. 213).

The power of disposition given by the Fines and Recoveries Act, 1833, to an actual tenant in tail (ss. 15, 19) appears to outlast the continuance of his estate, and the protector of a settlement retains his power after alienating the estate which gave it to him (s. 22). So the powers conferred by the Settled Land Acts on a tenant for life do not pass to an assignee of his estate, but remain exercisable by the original tenant, though without prejudice, except in the case of certain leasing powers, to the rights of his assignees for value without their consent (Settled Land Act, 1882, ss. 50-52; *In re Dickin and Kelsall's Contract*, [1908] 1 Ch. 213).

If, indeed, the donee alone, or with others, can and does dispose of the whole fee or other settled estate, his old powers are, it is conceived, extinguished, though if the transaction be by way of resettlement they may be saved (*Sug. Pow.*, 8th ed., 71).

Generally speaking the donee of a power can disclaim (45 & 46 Vict. c. 39, s. 6 (1)), or release it (*Sug. Pow.*, 8th ed., 88-90), even though it may be so far fiduciary that some exercises of it might be impeachable as fraudulent or improper (*In re Radcliffe*, [1892] 1 Ch. 227). Powers simply collateral were, until 1882, excepted from this doctrine, but it is now extended to them (44 & 45 Vict. c. 41, s. 52). Nevertheless, the existing authorities seem to show that where discretionary

powers are given to trustees they cannot extinguish them (*Eyre v. Eyre*, 1883, 49 L. T. 561; *Saul v. Pattinson*, 1886, 34 W. R. 561; and see *Waller v. Ker*, 1866, L. R. 1 H. L. Sc. 11; but see also Chitty, J., [1896] 1 Ch. 255). The powers under the Settled Land Act, 1882, of a tenant for life are not capable of assignment or release (ss. 50 (1)). The subsection does not mention disclaimer but it is within the mischief the enactment was designed to hinder. Probably the tenant cannot accept the estate and disclaim the power (Wolstenholme on *Act*, 5th ed., 278; see *In re Lord and Fullerton's Contract*, [1896] 1 Ch. 228).

Merger of a power over land does not necessarily occur on the acquisition by the donee of the fee in that land. The power and the fee can coexist in one person (*Maundrell v. Maundrell*, *ubi supra*; *Sug. Pow.*, 8th ed., 93-99), but it will appear that the accession to adults of the fee or absolute interest at the end of the operation of a settlement usually determines the powers contained in it.

The donor of a power must, of course, be personally competent to contract and make conveyances, and be entitled to an estate or interest in, or a power over, the property to be affected sufficient to enable him to do what he purports to authorise the donee of the power to do.

Donees.—Anyone who is not subject to any personal disability may be the donee of a power. To what persons the several powers in common use are ordinarily given will be found stated in the articles describing those powers respectively, which are above referred to.

Donees—Disabilities—Coverture.—Coverture was not, even before 1883, a disability which incapacitated a wife from exercising a power given to her, if expressly or by implication the donor showed an intent that she might appoint while married, or, probably, unless a contrary intent could be inferred. The question was examined at much length by Lord St. Leonards (*Pow.*, 8th ed., 153-168) and Mr. Chance (ss. 476-562), and appears to be settled in the above-stated manner (*Farwell, Pow.*, 1st ed., 93). That a wife could not, in exercise of a power of leasing, make a good lease to her husband, was decided, not because she was incompetent to appoint, but that the intended relation of lessor and lessee could not be constituted (*Doe d. Hartridge v. Gilbert*, 1843, 5 Q. B. 423; 64 R. R. 533). Such a case would need reconsideration now (*Sutherland v. Sutherland*, [1893] 3 Ch. 169, 184, 196). See savings of wives' powers in the Fines and Recoveries Act, 1833, s. 78; the like, Ireland, 1834, s. 69; 20 & 21 Vict. c. 57, s. 3; Settled Land Act, 1882, s. 61; Married Women's Property Act, 1882, ss. 1, 4, 5.

Infancy.—The law concerning the competence of infants to exercise powers cannot be stated shortly and surely. An infant cannot exercise a power capable of exercise by will only (the Wills Act, 1837, s. 7). Concerning other powers, possibly the true doctrine may be that powers are not, generally speaking, capable of exercise by infants, if they require, as in most cases they do, discretion for their proper exercise; but that all powers may be made exercisable during infancy, except some as yet undefined early part of it, if the donor so desire, and his intent clearly appear. Such a doctrine, however, even if it be deducible from the whole current of authority, has not yet been authoritatively deduced (*Sug. Pow.*, 8th ed., 177; *In re D'Angibau*, 1880, 15 Ch. D. 228; *In re Armitt*, L. R. 5 Eq. 352). The Infants Settlement Acts, 18 & 19 Vict. c. 43; 23 & 24 Vict. c. 83, made provisions for, among other things, the exercise by infants of some powers with the sanction of the Court.

Lunacy.—Where the donee of a power is either a lunatic so found,

or any other person described in the Lunacy Act, 1890, s. 116, to whom the provisions of the Act relating to management and administration apply, the Judge in Lunacy may authorise the committee of the estate (s. 120) or other person (s. 116 (2)) to exercise specified powers (*ibid.*, s. 120 (h), (b), ss. 122, 128, 129, 141).

Repeated Exercise.—Some powers—for example, powers of sale—cannot be exercised repeatedly over the same subject; others, such as powers of leasing, can. A power to apportion a fund among the members of a class cannot be exercised twice unless the first exercise be made revocably. A power to jointure may be exercised first in favour of one wife, and again in the event of her death and the donee's second marriage in favour of another. Probably in most cases a generally worded authority to do what may be done repeatedly authorises repeated exercises of it; but it may be prudent (*Brown v. Nisbett*, 1750, 1 Cox, 13; *Vane v. Lord Dungannon*, 1804, 2 Sch. & Lef. 118, 127), and is usual to expressly authorise the donee “at any time or times” to do the specified act. The Settled Land Act, 1882, declares that the powers it confers may be exercised repeatedly (s. 55).

Priorities of Limitations in Exercise of Powers.—An estate or interest created by the exercise of a power takes effect from the date of that exercise, as if it had been created by the instrument which conferred the power, and overreaches other limitations contained in that instrument, so far as may be necessary for the purpose of the appointment. Thus a demise made in exercise of a power by a tenant for life precedes that estate and all the remainders (*Whitlock's Case*, 1608, 8 Rep. 69b, 71a; 77 E. R. 580). The object of a power of selling is to enable the donee of it to convey to a purchaser a title complete against the immediate objects of the settlement and those claiming under them (1 Sanders, *Uses*, 167). Interests created by exercises of powers operate *pro tanto* in substitution for interests limited to the appointees in default of appointment (*Sug. Pow.*, 8th ed., 479). They may escape liabilities to which the latter are subject (*Lee v. Olding*, 1856, 25 L. J. Ch. 580; *Sweetapple v. Horlock*, 1879, 11 Ch. D. 745; *A.-G. v. Earl of Selborne*, [1902] 1 K. B. 388), or incur other liabilities (*Jackson v. Commissioner of Stamps*, [1903] A. C. 350). The priorities among themselves of estates and interests created in exercise of powers, and the question whether settlements should expressly provide answers for doubts concerning such priorities, or whether it may be left to the law to determine those priorities, have been debated by eminent conveyancers, but cannot be usefully treated of in this abridgment (see Butler's Note vii. 2 to Co. Litt. 271b; 1 Sanders, *Uses*, 165-168; *Sug. Pow.*, 8th ed., 488-492, 639; 3 Dav. *Conv.*, 3rd ed., 591-593). It follows, however, from what has been stated, that the title of an appointee to the property appointed is distinct from, and takes priority of, that which, if he be also entitled in default of appointment, he derives under the latter trust (*Boyle v. Bishop of Peterborough*, 1791, 1 Ves. Jun. 299; 30 E. R. 353; 2 R. R. 108; *In re Vizard's Trusts*, 1866, L. R. 1 Ch. 588; *Lovett v. Lovett*, [1898] 1 Ch. 83). The donee of a power cannot so exercise it as to derogate from an interest he has already created (*Wilson v. Kenrick*, 1885, 31 Ch. D. 658).

Relation of the Rule against Perpetuities to Powers.—A power given to a person not necessarily ascertainable within the period prescribed by the rule, transgresses it and is void (*Ferrand v. Wilson*, 1845, 4 Ha. 344; *In re Hargreaves*, 1889, 43 Ch. D. 401); but the circumstance

that a power may be so exercised as to transgress the rule does not make the power void, if the donee can in exercise of it appoint an interest which will vest within the permitted period (*Slark v. Dakyns*, 1874, L. R. 10 Ch. 35). The rule requires that the vesting of the interest created shall not be deferred until after the determination of a life or lives in being at the creation of the interest and the subsequent expiration of a term of twenty-one years and the period of gestation, if gestation exists. In the case of an interest created in exercise of a general power, it is deemed, for the purpose of the rule, to be created by the exercise of the power (Lewis on *Perpetuities*, 483; *Sug. Pow.*, 8th ed., 394-396). As to a general power exercisable by will only, see *In re Powell*, 39 L. J. Ch. 188, but also 29 Ch. D. 521; 34 W. R. 149; [1896] 2 Ch. 567; but in the case of an interest appointed in exercise of a special power, it is deemed to be created by the instrument conferring the power (Lewis on *Perpetuities*, 484). Every future interest appointed in exercise of a special power must be so limited as that it must vest within the period allowed by the rule, and computed from the date of the settlement creating the power, or if that settlement be made by will, from the death of the testator.

Periods during which Powers may be Exercised.—The questions during what period a power is intended to be capable of being exercised, and whether there is any legal hindrance to its continuance during that period, often need consideration. Definite purpose and explicit language concerning these points are needed in framing powers. The context, however, often sufficiently shows the meaning of indefinite words. Generally, a power given to a specified person may be exercised at any time during his life (*Sug. Pow.*, 8th ed., 261; Lord Campbell, C., 1860, 2 De G., F. & J. 461; 45 E. R. 700). One given to a trustee or executor, as such, may be exercised by him so long as and no longer than he holds the office. The circumstance that a power given to a woman expressly authorises her to exercise it, notwithstanding coverture, does not always imply that she may not exercise it while sole (*Doe v. Bird*, 1833, 2 Nev. & M. 679). A power to appoint among their children given to the survivor of a husband and wife has been held not to authorise a joint appointment (*MacAdam v. Logan*, 1791, 3 Bro. C. C. 310), or one by the eventual survivor during the life of the other (*Doe v. Tomkinson*, 1813, 2 M. & S. 165; *Sug. Pow.*, 8th ed., 124, 265; *Chance, Pow.*, 412; *Hole v. Escott*, 1838, 4 Myl. & Cr. 187; 41 E. R. 74; 48 R. R. 63); but where the power given to the survivor of several is a general one, it may, during the lives of all or some, be exercised by the one who eventually survives (Lord Westbury, C., in *Thomas v. Jones*, 1862, 1 De G., J. & S. 63, 79; 46 E. R. 25).

Where powers, such as powers of jointuring and charging portions, are intended to authorise such charges only in the event of the donees or their issue becoming entitled in possession to the land to be charged, it is usual to expressly enable the donee to exercise them, while it is still uncertain whether he or his issue will become so entitled, leaving the efficacy only of the appointment contingent on the still uncertain event.

Powers of sale, leasing, and the like conferred upon the trustees of a settlement, without any definition of the period during which they may be exercised, are held to be capable of being exercised while estates for life or in tail under the settlement subsist (*Lantsbery v. Collier*, 1856, 2 Kay & J. 709; 69 E. R. 967), or possibly for twenty-one years after the determination of the last life estate (*Sug. Pow.*, 8th ed., 849).

An unlimited power of sale for the purposes of division of the proceeds among a class may be exercised within a reasonable time after the death of a person living at its creation (*In re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334; [1897] A. C. 11).

The doctrines above stated prevent the powers to which they are applicable from being obnoxious to the rule against perpetuities (see PERPETUITY and REMOTENESS).

How Powers should be Exercised.—The exercise of a power must aim only at the end for which the power was designed (*Aleyn v. Belchier*, 1758, 1 Eden, 132; 28 E. R. 634), and the formalities required by the donor must be observed. An appointment needs consideration with reference to both its substance and its form.

Execution of, Fraudulent.—It is, however, almost if not quite exclusively in the case of limited powers that it is necessary to see that they are exercised for the end designed. The ordinary powers of appointing among the members of a class of issue must be exercised by the donee with a single view to the object of the power (*Duke of Portland v. Topham*, 1864, 11 H. L. C. 32, 55; 11 E. R. 1242), and not in order to accomplish any by-object (*ibid.*), or to obtain a benefit for either the appointor (*Lord Hinchinbroke v. Seymour*, 1784, 1 Bro. C. C. 395; 28 E. R. 1200; see *Henty v. Wrey*, 1882, 21 Ch. D. 332) or any person who is not an object of the power (*In re Marsden's Trust*, 1859, 4 Drew. 594; 62 E. R. 228).

The expressions "fraud on the power" and "fraudulent appointment," which are most frequently used to designate these improper exercises of powers or to describe their character, are often inexact, as they suggest an immorality in the appointor with which he may not be chargeable. In what is commonly treated as the leading case (*Aleyn v. Belchier*, *ubi supra*, 1 White and Tudor, *L. C. in Eq.*) a corrupt intention by the donee of the power did exist. He sought by the exercise of a power to charge with a jointure for his wife to create one for his own benefit. The burden of proving fraud lies on him who charges it. See FAMILY ARRANGEMENT; PURCHASER FOR VALUE.

If an appointment be made in pursuance of an agreement with the appointee for his giving a benefit to the appointor or anyone not an object of the power (*Daubeny v. Cockburn*, 1816, 1 Mer. 626; 35 E. R. 801; 15 R. R. 174; *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373), the appointment is void. The common appointment by a parent to a child in expectation of marriage and of a settlement to be made on the marriage is permitted (*Sug. Pow.*, 8th ed., 670-673); as are appointments good in part though bad in part (Clarke, M.R., in *Alexander v. Alexander*, 1755, 2 Ves. 640, 644; 28 E. R. 408), if the good part is distinguishable and separable from the bad, and was intended by the appointor independently of the part to which effect cannot be allowed.

The form of an appointment is also important. A power to appoint by deed cannot be exercised by will (*Sug. Pow.*, 8th ed., 209); nor can one to appoint by will be exercised by an act to take effect in the life of the donee (*ibid.*, 210; *Thacker v. Key*, 1869, L. R. 8 Eq. 408). If, as was formerly customary, attestation by two or more witnesses is required by the power, the requisition must be complied with. Indeed, a direction that the appointment should be under the hand and seal of the appointor, attested by witnesses, required the attestation clause to express that the deed was both signed and sealed in their presence

(*Wright v. Wakeford*, 1811, 17 Ves. 454; 34 E. R. 176; 15 R. R. 363*n.*); but except in the case of deeds executed after the 29th July 1814, and before the 13th August 1859, that law is abrogated (54 Geo. III. c. 168; 22 & 23 Vict. c. 35, s. 12). If a power capable of exercise by will after 1837 be so exercised, the will must be executed, as the Wills Act of that year requires wills to be executed, and if so executed need not be executed with any other solemnity, though it may be required by the power (s. 9). A power which may be exercised by writing may be exercised by will, but if the will be made after 1837 it must be executed as the Act requires (*Taylor v. Meads*, 1865, 4 De G., J. & S. 597; 46 E. R. 1050).

A general devise or bequest in a will made after 1837 passes real or personal estate which the testator has power to appoint in any manner he may think proper, unless a contrary intention appears by the will (Wills Act, 1837, s. 27).

Exercises Defective in Form: where Remedied.—In some cases in which the donee of a power has purported to exercise it, but has neglected to comply with a direction by the donor of the power concerning the form of its exercise, the Court, in the exercise of its equitable jurisdiction, has deemed itself entitled to supply the defect, if the intention of the appointor appear, if the act he intended to do be authorised by the power, if the defect be formal only, and if the object of the intended appointment be a purchaser for valuable consideration, a person for whom the appointor is under a natural or moral obligation to provide, a creditor of the appointor, or a charity (*Sug. Pow.*, 8th ed., 549-568; *Farwell, Pow.*, 2nd ed., 327-361). The principle upon which the Court in these cases acts, Lord Alvanley, M.R., stated thus: Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute a power, the Court will operate on the conscience of the heir to make him perfect this intention (1791, 3 Bro. C. C. 230). Sir William Grant, M.R., challenged the validity of the principle, pointing out that the person affected by the decree, the owner of the property in default of appointment, is a stranger to the equity between the appointor and the person in whose favour he intended to exercise the power (1802, 7 Ves. 506). The doctrine, however, is established, though reliance on its application in a particular case cannot be felt without much circumspection and examination of the decided cases. So also some contracts by donees to exercise powers have been enforced against remaindermen (*Dowell v. Dew*, 1843, 7 Jur. 117; *Davis v. Hartford*, 1882, 22 Ch. D. 128).

The legislature has provided remedies for some particular defects, such as some in forms of attestation (Preston's Act, 54 Geo. III. c. 168; 22 & 23 Vict. c. 35, s. 12), some in the number of witnesses to wills (Wills Act, 1837, 1 Vict. c. 26, s. 10), some in deviating in leases from the terms required by the powers under which they purport to be made (12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17), and some in sales under powers in which the tenants for life have taken timber money (22 & 23 Vict. c. 35, s. 13).

The equitable jurisdiction to supply defects in the exercise of powers cannot be employed in the case of an exercise of a statutory power (*Sug. Pow.*, 8th ed., 564; *Farwell, Pow.*, 2nd ed., 343, 344); but contracts by a tenant for life or by a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, to exercise any of

those powers, will bind the remaindermen (S. L. A., 1882, s. 31 ; S. L. A., 1890, s. 6).

Consent.—The lack in the exercise of a power of a consent, which the donor in creating the power required, is not a mere formality which ordinarily the Court can supply (see Farwell, 2nd ed., 131, 138, 140-142).

Exclusive and Illusory Appointments and Hotchpot Clauses.—Those dispositive powers which enable the donees to distribute a fund among members of a class may be either exclusive or non-exclusive, that is to say, they may either enable the donees to give the whole fund to some one or more only of the members of the class, excluding the other members or member, and this is what such powers most frequently are intended to authorise, or they may require every member to be benefited, the donees being empowered to determine only the amount and often other conditions of the shares in which they shall take respectively. Obviously, the non-exclusive purpose of the maker of a power might be frustrated by the donee's giving a share of unsubstantial value to an object he wished not to benefit. The device succeeded at law (1 T. R. 438*n.*), but the Court of Chancery defeated it (*Gibson v. Kinven*, 1682, 1 Vern. 66; 23 E. R. 315), holding the appointment to be illusory. Lord Alvanley, M.R., lamented the introduction of the doctrine and, stating the authorities for it, showed the difficulty of discriminating between substantial and illusory appointments (*Kemp v. Kemp*, 1801, 5 Ves. 849, 858; 31 E. R. 891; 5 R. R. 182; Sug. Pow., 8th ed., 938). The inconvenience of the equitable doctrine induced the legislature in 1830, and at the instance of Lord St. Leonards, then Sir E. B. Sugden, to support the rule of law (11 Geo. iv. & 1 Will. iv. c. 46). Forty-four years later the Earl of Selborne sought a new remedy in an Act "that no appointment . . . made in exercise of any power to appoint any property . . . amongst several objects" should "be invalid . . . on the ground that any object of such power" had "been altogether excluded" (37 & 38 Vict. c. 37, s. 1). Donors may still declare the amounts from which no object shall be or some or one shall not be excluded (*ibid.*, s. 2). Powers of appointment of the kind under consideration are usually followed by what is called a Hotchpot Clause, being one precluding an appointee from participating under the usual trust in default of appointment in an unappointed part of the fund, without accounting for the part appointed to him under the power as part of what he is entitled to under the trust. See also ILLUSORY APPOINTMENTS.

Appointments of Part of a Fund.—In the interpretation of exercises of a power to appoint a fund among several objects the following rules are important:—Where an appointment is made of aliquot parts of a fund, or of parts of the fund exhausting the whole by one instrument, or by several instruments, which form one transaction and ought to be construed together, there, *primâ facie*, there is no priority, and the several parts of the fund, if the fund proves deficient, must abate rateably; but where, under a like power, several sums are appointed by successive independent deeds, there, *primâ facie*, the sums or parts appointed, not being aliquot parts, have priority according to the dates of the deeds (Chitty, J., in *Wilson v. Kenrick*, 1885, 31 Ch. D. 658, 661, 662; and see *In re Croft*, [1892] 1 Ch. 652; *In re Cruddas*, [1900] 1 Ch. 730; *In re Tancred's Settlement*, [1903] 1 Ch. 715).

Estates Appointed either Remainders or Executory Uses.—The future

estates which powers authorise the donees to create in land must be either contingent remainders or executory springing or shifting uses or trusts. If land be settled to the use of A. for life, and after the determination of that estate to the use of such children or child of A. as he shall appoint, and A. appoint an immediately expectant estate to a child, that limitation creates a remainder (*Whitby v. Mitchell*, 1889-1890, 42 Ch. D. 494; 44 *ibid.* 85). See CONTINGENT REMAINDERS; EXECUTORY INTERESTS. The distinction is not important, or indeed possible, with reference to appointments of personalty, because in property of that kind no remainders or other estates were recognised by the Courts of law as distinguished from those of equity.

Powers to Appoint New Trustees.—The greater number of settlements need for their efficiency trustees, and consequently it is necessary to provide means whereby, on the failure, inability, or unfitness of those first appointed to perform their functions, others may be substituted. For that purpose a power to appoint from time to time new trustees was invented, and until 1860 it constituted a usual provision in instruments creating trusts. Since that year powers constituted by Act of Parliament have existed, and in a settlement it is now unnecessary to insert more than a few words adapting the statutory power to the needs of the particular case. (For an account of these powers, see TRUSTS.)

[*Authorities.*—*Sug. Pow.*, 8th ed.; *Chance, Pow.*; *Farwell, Pow.*, 2nd ed.; *Vaizey, Settlements*, pp. 341-401.]

PRECEDENTS.

The following are Precedents of Appointments under Powers and illustrate the above article.

I. APPOINTMENT by the DONEE of a General Power of Residuary Estate in his own Favour.¹

TO ALL TO WHOM THESE PRESENTS SHALL COME, A. [appointor], of, &c., sends greeting [*recite will bequeathing residue in trust for A. for life, with remainder on such trusts as he may by deed or will appoint: death and probate: assent of executors to bequest*]: AND WHEREAS the said A. has determined to exercise in manner hereinafter expressed the power of appointment given to him by the said will as aforesaid: NOW THESE PRESENTS WITNESS that, in exercise of the power reserved to him by the said will, and of all other powers thereunto him enabling, the said A. doth hereby irrevocably appoint and direct that the residuary estate of the said testator and the investments and property constituting or representing the same shall belong to and be vested in him the said A., absolutely, and that the same shall be forthwith paid or transferred to him accordingly.

IN WITNESS, &c.

¹ It is not uncommon for a tenant for life to have a general power of appointment by deed or will over the reversion. In such a case it sometimes conduces to simplicity and saves trouble if he makes the property his own by an appointment of this nature. But *qu.* whether an appointment of this kind might not in some cases increase the succession duty ultimately payable (see *A.-G. v. Mitchell*, 6 Q. B. D. 548). It cannot affect the estate duty. As to effect of execution of a general power, *vide supra*, p. 387.

II. *APPOINTMENT in FEE of PART of ESTATES included in a Power, subject to the Estates for Life of the Appointor, and his Wife.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [appointor], of, &c., sends greeting. WHEREAS under or by virtue of the will of [testator], of, &c., deceased, dated the day of 19 and proved on the day of 19 , in the Principal Registry of the Probate Division of His Majesty's High Court of Justice, the messuage and hereditaments, hereinafter described and expressed to be hereby appointed, stand limited to the use of the said [appointor] and of [wife] his wife, successively during their respective lives, with remainder to such uses as the said [appointor] shall by deed or will appoint, with remainders over as in the said will is mentioned. NOW THESE PRESENTS WITNESS, that the said [appointor], in exercise of the power reserved to him by the said will, and of all other powers enabling him in this behalf, hereby appoints that ALL THAT messuage, &c., situate, &c., being part of the hereditaments by the said will made subject to the appointment of the said [appointor], with their appurtenances, shall henceforth go, remain, and be TO THE USE of the said [appointee], his heirs and assigns¹; Subject nevertheless and without prejudice to the several estates for life of the said [appointor], and [wife], his wife, respectively, in the hereditaments and premises hereby appointed.

IN WITNESS, &c.

III. *APPOINTMENT by a FATHER and ELDEST SON where Lands were limited to such Uses as they should jointly appoint, with Remainders over.*²

TO ALL TO WHOM THESE PRESENTS SHALL COME, the Most Noble G., Marquis of P. and Earl of B., &c., and the Right Honourable C. K., commonly called Earl of B., eldest son of the said Marquis of P., send greeting. WHEREAS by virtue of an indenture dated the day of ; and expressed to be made between the said G., Marquis of P., of the first part, the said Earl of B., of the second part; and [trustees], of the third part; All those, &c. [parcels], were (subject to certain charges mentioned in the same indenture) conveyed and assured To the use of the said G., Marquis of P., for life with remainder to such uses as they the said Marquis of P., and Earl of B., during their joint lives should by deed from time to time jointly appoint: And in default of such appointment To the use of the said Earl of B. for his life, with remainder to the use of his first and other

¹ An appointment of real estate is merely a right to limit a use. The appointment must, therefore, be made to the use of the person intended to take directly, and without the interposition of a grantee to uses, otherwise the grantee will take the first use under the original estate, and thus the legal estate will vest in him. See *Sugd. Pow.*, 190.

² The limitation of the uses in this precedent has no greater tendency to a perpetuity than a simple conveyance in fee. Under the general power in question the donee may tie up the estate for exactly the same period, but not longer, than he could were he seised in fee. *Sugd. Pow.*, 195; *supra*, p. 387.

IN WITNESS, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, the within-named A. and B., his wife, formerly L. within named, respectfully send greeting. WHEREAS the marriage of the said A. and B. was duly solemnised shortly after the date of the within written indenture: AND WHEREAS there have been issue of such marriage seven children, including a son C., who has attained the age of twenty-one years: AND WHEREAS in the year the sum of £ was, with the

consent of the said A. and B., raised out of the trust funds comprised in the within written indenture and applied for the advancement of the said C. and the expenses incidental thereto, and advancements have also been and may hereafter be made in favour of others of the said children in respect of their expectant shares of the said trust funds under the power in that behalf within contained: AND WHEREAS a marriage is intended shortly to be solemnised between the said C. and D., the daughter of P.: AND WHEREAS the said A. and B. are desirous of making such appointment of part of the trust funds in favour of the said C. as is hereinafter contained: NOW THESE PRESENTS WITNESS that in exercise of the power in that behalf given to them by the within written indenture of settlement, and of every other power enabling them thereunto, the said A. and B. do hereby, subject and without prejudice to their respective life interests under the trusts of the within written indenture, absolutely and irrevocably appoint to the said C., in the event of the said intended marriage of the said C. and D. being duly solemnised within six calendar months from the date of these presents, such a part or share of the trust moneys, stocks, funds, securities, and property which are now or may hereafter be comprised in or subject to the trusts of the within written indenture (including in the property so comprised the sum of £ so paid or applied for the advancement of the said C. as aforesaid, and any other sums which have been or may be advanced for the benefit of any of the said children under the powers aforesaid, and also any income and accumulations of income), as the said C. would take or be entitled to, if no appointment were made by the said A. and B., or the survivor of them, under either of the powers by the same indenture given to them, or the survivor of them, in that behalf, and the whole of the said trust premises were to devolve under the trusts in the said indenture contained in default of any exercise of either of such powers, and so as to be divisible in equal shares among the children of the said A. and B., who, being sons or a son, attain the age of twenty-one years, or being daughters or a daughter, attain that age, or marry under that age, regard being had to the advance which has been made of the sum of £ for the benefit of the said C., which is to be brought into hotchpot, and accounted for by him in the same manner as if no appointment had been made as aforesaid, and regard being also had to any other advancements which have been or may be made under the aforesaid power in that behalf, and to the operation and effect of that power, and the powers and provisions for maintenance and education, and the accumulation and destination of surplus income contained in the said settlement or arising by statute, which shall respectively remain exercisable and applicable in all respects in the same manner as if this appointment had not been made, to the intent that the share which the said C. would have so taken in the said trust premises as aforesaid, shall become and be an absolutely and indefeasibly vested and transmissible interest immediately on the solemnisation of the said intended marriage, and be transferable immediately on the decease of the survivor of the said A. and B., or as soon afterwards as such share shall be ascertained, and the case will admit.

IN WITNESS, &c.

V. *APPOINTMENT under a POWER in a WILL by a HUSBAND and WIFE, subject to their Life Interests, of Trust Funds invested in Stock and on Mortgage, to Children, so as to Exclude One who is otherwise provided for, the Funds being appointed Unequally.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, A., of, &c., and B., his wife, send greeting. WHEREAS X., of, &c., deceased, duly made his will dated, &c., and thereby bequeathed the sum of £ 2½ per cent. Consolidated Stock to trustees upon trust either to permit the same to remain in its then state of investment, or with such consent, or at such discretion as therein mentioned from time to time to vary and transpose the investment thereof as therein expressed; And upon further trust to pay the income thereof to the said A. during his life, and after his decease to the said B., if she should survive him, during her life; And after the decease of the survivor of the said A. and B., in trust [*for their children as A. and B. should by deed appoint, setting out the material part of the power fully*], and in default of any such appointment as the survivor of them, the said A. and B., should by deed or will appoint, and in default of any such appointment upon the trusts therein expressed [*death of testator and probate*]: [AND WHEREAS shortly after the death of the said X. £ stock, part of the said sum of £ stock, was sold, and the proceeds thereof were applied in payment of the settlement estate duty¹ on the said sum of £ stock, and the sum of £ stock the residue of the said sum of £ stock was appropriated by L. M. and N., the original trustees of the said will in satisfaction of the said legacy]; AND WHEREAS N., O., and P. are the present trustees of the said will, the said O. and P. having been respectively appointed trustees thereof under a power in that behalf therein contained in the place of the said L., who had died, and the said M., who had retired from the trusteeship: AND WHEREAS there have been issue of the marriage of the said A. and B. four children and no more, namely, C., D., E., and F., all of whom are now living, and of whom the said C. and D. have attained the age of twenty-one years: AND WHEREAS the said A. and B. are desirous of appointing the said trust funds among the said D., E., and F., in manner hereinafter appearing, the said C. being otherwise provided for: NOW THESE PRESENTS WITNESS that, in exercise of the power, in that behalf given to them by the said will of the said X., and of every, other power enabling them thereunto, the said A. and B. do hereby absolutely and irrevocably appoint that from and immediately after the decease of the survivor of them, the said A. and B., and in the meantime subject and without prejudice to their life interests in the said trust premises, the trustees or trustee for the time being of the said will shall hold the said sums of £ India Stock, and £ invested on mortgage as aforesaid, or other the trust funds

¹ See the F. A., 1896, s. 19, which came into operation after June 30, 1896, and *Re Gibbs*, [1898] 1 Ch. 625. The form of recital in this bracket can be adapted to cases where legacy duty was payable out of the settled legacy. As to when, under the terms of the will, duties are payable out of the settled legacy or out of residue, see article DEATH DUTIES, Vol. IV. p. 364.

and property which by means of any change of investment or otherwise shall hereafter represent the same respectively, and the income thereof, In trust for and for the absolute benefit of the said D., E., and F., in the proportions and manner following, namely, as to one moiety of the said trust premises, in trust for the said D.; as to one equal fourth part thereof, in trust for the said E.; and as to the remaining one-fourth part thereof, in trust for the said F.: AND so that the share of the said F., of and in the said trust premises, shall be for her separate use, independently of any husband whom she may marry.

IN WITNESS, &c.

VI. *APPOINTMENT of a JOINTURE under a Power contained in a Strict Settlement.*

THIS DEED, made the day of 19 , by [appointor], of, &c., and supplemental to an indenture of settlement dated the day of 19 , and expressed to be made between [parties]: WITNESSETH that in consideration of the marriage lately solemnised between the said [appointor] and [wife] his wife, the said [appointor], in exercise of the power reserved to him by the said indenture, and of every other power in anywise enabling him in this behalf, hereby (subject and without prejudice to the estate by the said indenture limited to the said [father] for life, and to the raising and payment of the said sums of £ and £ , and the interest thereon respectively, or otherwise subject as in the same indenture is mentioned) grants and appoints unto the said [wife] during her life, in case she should survive him the said [appointor], the annual sum or yearly rent-charge of £ to be issuing out of, and charged upon all and singular the manors and hereditaments comprised in the said indenture, such rent-charge to be for the jointure of the said [wife], and in bar of all dower, and freebench, and to be paid to the said [wife], by equal half-yearly payments on the day of , and the day of , in every year, without any deduction; the first half-yearly payment thereof to be made on such of the said days as shall first happen after the decease of the said [appointor]. PROVIDED ALWAYS that nothing herein contained shall prevent the said [appointor] from granting and appointing any further rent-charge or rent-charges to the said [wife] under the power of jointuring for that purpose reserved by the said indenture or any other such power as aforesaid.

IN WITNESS, &c.

VII. *APPOINTMENT by a FATHER of a Portion¹ to a Daughter on her Marriage, under a Power contained in a Strict Settlement of the Family Estates.*

THIS DEED, made the day of 19 , by [appointor], of in the county of , esquire, and to be read as an annex [or supplemental] to an indenture of settlement, dated, &c., and expressed to be made between, &c. [parties]. WHEREAS there

¹ Note, p. 396, *supra*.

have been issue (other than an oldest son) of the said [appointor], by [wife] his wife, three sons and two daughters, that is to say, A. F., who attained the age of twenty-one years, and is since deceased, B. F., who died an infant, C. F. [former appointee], who has attained the age of twenty-one years, and is now the wife of M. N., D. F. [present appointee], who has attained the age of twenty-one years, and E. F., now an infant of the age of years, or thereabouts: AND WHEREAS by a deed-poll under the hand and seal of the said [appointor], dated, &c., and thereby directed to be read as an annex to the said indenture of settlement, the said [appointor], in pursuance of the power reserved to him by the same indenture, appointed the sum of £ , part of the sum of £ , thereby authorised to be raised for the portions of his daughters and younger sons (if three or more), as therein is mentioned, unto the said [former appointee, married name], then [maiden name], as her portion, in case her then intended marriage with the said [her husband] should take effect and directed the same to be raised and paid immediately upon the solemnisation thereof, which shortly afterwards took place, and the said sum of £ was accordingly afterwards raised by a mortgage of part of the estates comprised in the said settlement, and paid by the direction of the said [former appointee] and [her husband], to [trustee] and [trustee] as the trustees of her marriage settlement: AND WHEREAS a marriage is intended to be shortly solemnised between the said [appointee] and [intended husband], of, &c.: AND WHEREAS the said [appointor], is desirous of appointing the sum of £ further part of the said sum of £ so authorised to be raised as aforesaid, unto the said [present appointee], to be paid immediately upon the solemnisation of the said intended marriage in manner hereinafter appearing. NOW THESE PRESENTS WITNESS that in consideration of the said intended marriage, and in exercise of the power reserved to him by the said indenture of settlement, and of all other powers (if any) enabling him in that behalf, He the said [appointor] hereby appoints the sum of £ , further part of the said sum of £ , by the same indenture of settlement authorised to be raised for the portions of his daughters and younger sons (if three or more), as aforesaid, unto the said [appointee], as and for her marriage portion or fortune, in case the said intended marriage shall take place; AND the said [appointor], hereby authorises and directs [trustee], the surviving trustee of the said term of two hundred years, created by the said indenture of settlement, forthwith, or as soon as may be after the solemnisation of the said intended marriage, to raise the said sum of £ hereby appointed, by a mortgage of a competent part of the estates comprised in the said indenture of settlement, and to pay the same to the person or persons who shall be entitled thereto, by virtue of the appointment hereby made. PROVIDED ALWAYS, and the said [appointor] declares that the appointment hereby made is not intended by him to prevent him from hereafter appointing any part or share of the residue of the said sum of £ to her the said [appointee], in case he should think proper so to do, or to prevent her from hereafter having or taking under and by virtue of the trusts of the said settlement any part or share of the residue of the said sum of £ , in case he the said [appointor] should

not hereafter make any appointment of or concerning the same, or from having or taking any part or share of so much of the said residue as shall or may ultimately remain unappointed by him the said [appointor]: Save only and except that the said [appointee] shall not in any event hereafter, unless by the appointment of the said [appointor], have or take any further or greater part of the said residue of the said sum of £ , than will, with the said sum of £ hereby appointed to her as aforesaid, make up what would have been the full part or share of her the said [appointee] under and by virtue of the trusts of the said settlement of and in the said sum of £ , in case he the said [appointor] had not made any appointment whatsoever of or concerning the same, or any part thereof.¹ PROVIDED ALSO that the appointment hereby expressed to be made shall be void, if the said intended marriage shall not take place within twelve calendar months from the date of these presents.

IN WITNESS, &c.

VIII. *APPOINTMENT by a FATHER and MOTHER of Stock amongst their Children equally, subject to their own Life Interests therein (by Indorsement); and a Power of Revocation.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, the within-named [father] and [mother], in the within-written indenture called [mother's maiden name], send greeting. WHEREAS shortly after the date of the within-written indenture, the then intended marriage between the said [father] and [mother], his wife, was duly solemnised: AND WHEREAS there is issue of the said marriage, now living, two sons, namely, A. B. and C. B., and five daughters, namely, E. Y., the wife of, &c., F. B., G. B., H. B., and I. B.; and all the said children, except the said H. B. and I. B., have attained the age of twenty-one years: AND WHEREAS the trust funds now subject to the trusts of the said indenture of settlement are represented by the sum of £ £ per cent. Consolidated Bank Annuities, standing in the names of [trustees] the present trustees of the same indenture: NOW THESE PRESENTS WITNESS, that in exercise of the power to them for this purpose reserved by the said indenture of settlement, and of all other powers enabling them in this behalf, they the said [father] and [mother] hereby jointly appoint, that from and immediately after the decease of the survivor of them, the said [father] and [mother], his wife, the said sum £ £ per cent. Consolidated Bank Annuities, and the interest and dividends thereof, shall remain and be IN TRUST for the said A. B., C. B., E. Y., F. B., G. B., H. B., and I. B. respectively, in equal shares. PROVIDED ALWAYS that if either of them the said H. B. and I. B., shall die under the age of twenty-one years, without having been married, then the share of her so dying, of and in the said residue of the said sum of £ £ per cent. Consolidated Bank Annuities shall go and remain to the said C. B., E. Y., F. B. and G. B., and the survivor of

¹ This is the hotchpot clause referred to above, p. 395. It is not necessary if a similar clause is contained in the settlement under which the power is exercised.

them, the said H. B. and I. B., in equal shares. PROVIDED FURTHER NEVERTHELESS, that if both of them the said H. B. and I. B. shall die under the age of twenty-one years, without having been married, then and in such case, as well the original share of the survivor of them, so dying, as the share which by virtue of the last-mentioned clause shall have survived or accrued to the survivor of them, of and in the said residue of the said sum of £ £ per cent. Consolidated Bank Annuities shall go and remain to the said C. B., E. Y., F. B., and G. B., in equal shares: PROVIDED ALSO that it shall be lawful for the said [father] and [mother],¹ or the survivor of them, at any time or times hereafter, by deed to revoke all or any of the trusts and provisions hereinbefore declared and contained, of and concerning the said residue of the said sum of £ £ per cent. Consolidated Bank Annuities, and the interest and dividends thereof, or any part thereof respectively, and to appoint and declare any new or other trusts or provisions concerning the same respectively.

IN WITNESS, &c.

IX. *REVOCATION of APPOINTMENT (see the last Precedent), and New Appointment (by Endorsement below the Appointment hereby revoked).*

TO ALL TO WHOM THESE PRESENTS SHALL COME, the within-named [father] sends greeting. WHEREAS the above-named [mother] died on the day of 19 . AND WHEREAS the above-named H. B. died on the day of 19 , an infant and unmarried. AND WHEREAS the said I. B. attained the age of twenty-one years on the day of 19 . AND WHEREAS the above-named A. B. [the eldest son] has under or by virtue of the will of his maternal uncle, G. H., of, &c., deceased, become seised of or entitled to certain hereditaments in the county of , and is otherwise sufficiently provided for. NOW THESE PRESENTS WITNESS, that the said [father], in exercise of the power reserved to him by the above-written deed, and of every other power in this behalf him enabling, hereby revokes the appointment made by the above-written deed and the trusts therein declared and contained. And also in exercise of the power reserved to him by the within-written indenture, and of every other power in this behalf him enabling, appoints that the above-mentioned sum of £ £ per cent. Consolidated Bank Annuities, shall remain and be in trust for the above-named C. B., E. Y., F. B., G. B., and I. B. PROVIDED ALWAYS, that it shall be lawful for the said [father] at any time or times hereafter by deed to revoke, &c. (see proviso in last Precedent).

IN WITNESS, &c.

X. *RELEASE of GENERAL TESTAMENTARY POWER of APPOINTMENT.*²

TO ALL TO WHOM THESE PRESENTS SHALL COME [appointor], of, &c., sends greeting. WHEREAS [testator], of, &c., deceased, duly

¹ As to powers of revocation, *vide supra*, p. 388.

² For a precedent of a RELEASE of powers of jointuring and charging portions for younger children, see PRECEDENTS, tit. "RELEASE."

made and executed his will, whereby [*recite will bequeathing legacy in trust for A. for life, remainder to her issue, in default of issue as she may by will appoint, in default for her executors and administrators. That she has never had any issue and is past age of child-bearing*]: AND WHEREAS the said A. has determined to release the power of appointment so vested in her by the said will of the said X. over the said legacy or sum of £ in manner hereinafter appearing: NOW THESE PRESENTS WITNESS that in pursuance of such determination she the said A. doth hereby release and for ever discharge the said legacy or sum of £ from the power by the said will of the said X. given to her to appoint the same by will to the intent that the said legacy or sum of £ may henceforth be absolutely discharged from the said power of appointment, and that she the said A. may be absolutely precluded from exercising the same power, and that the said legacy or sum may devolve upon and become vested in the said A., her executors and administrators, according to the provisions in the said will contained in default of appointment thereof.

IN WITNESS, &c.

XI. *RELEASE of a POWER to JOINTURE.*

THIS INDENTURE, made the day of 19 ,
 BETWEEN [*tenant for life and donee of power*], of, &c., of the one part, and
 [*reversioner*], of, &c., of the other part: WHEREAS under or by virtue of
 an indenture of settlement, dated the day of 19 ,
 made between [*state parties*], and of an indenture, dated the day
 of 19 , made between [*state parties to, and recite disentailing deed,
 if such there be*], and of the events and marriages recited, mentioned or
 referred to in the said last-mentioned indenture, [*tenant for life*] is tenant
 for life of certain estates and hereditaments, situate in the parishes of
 , in the county of , with remainder to [*reversioner*] in fee
 simple, subject to a power by the said indenture of settlement given or
 reserved to [*tenant for life*] by deed or will to charge the said heredita-
 ments, or any part thereof, with a rent-charge not exceeding £
 per annum in favour of any wife who may survive him, during her life,
 by way of jointure, and to limit or create the usual powers and remedies,
 and a term of years for securing the same: AND WHEREAS it has been
 agreed between [*tenant for life*] and [*reversioner*], that in consideration
 of, &c. [*state consideration*], that the [*tenant for life*], should release the
 said power of jointuring in manner hereinafter appearing: NOW THIS
 INDENTURE WITNESSETH that in pursuance of the said agree-
 ment, and in consideration of the premises, [*tenant for life*] doth hereby
 absolutely release unto [*reversioner*], his heirs and assigns, the said power
 of jointuring by the said indenture of settlement given or reserved to
 [*tenant for life*] as aforesaid, to the intent that the same shall henceforth
 be absolutely extinguished and cease to be exercisable.

IN WITNESS, &c.

Powers given to Trustees generally. — See TRUSTS.

Powers in Real Property Settlements. — See SETTLED LAND ACTS.

Powers in Settlements of Personalty.

TABLE OF CONTENTS.

I. POWERS OF APPOINTMENT AMONGST ISSUE	406	IV. POWERS OF APPOINTING LIFE INTERESTS	410
II. POWERS OF ADVANCEMENT	409	V. POWERS OF MAKING FUTURE SETTLEMENTS	411
III. POWERS OF MAINTENANCE AND EDUCATION	410	VI. POWERS OF REVOCATION	411
		VII. OTHER POWERS	411

Settlements of personal estate include, according to the understanding of conveyancers, settlements of land as personal estate by way of trust for sale and declaration of trust of the proceeds; and settlements of this description contain usually powers of management until sale, and of exchange and of leasing, and other powers appropriate to the nature of the property in its actual condition when settled. It is considered that these powers are sufficiently dealt with in the articles SETTLEMENTS and SETTLED LAND ACTS. And as regards the general powers of trustees including those of investment, and the power of appointing new trustees, these are dealt with in the article TRUSTS. The present article is confined therefore to such other powers as are commonly or frequently introduced into settlements of personal estate (whether on marriage or otherwise *inter vivos*); and the powers so treated of are distributed (as nearly as may be in the order in which they occur in a settlement) under the following heads, viz.:—I. Powers of Appointment amongst Issue; II. Powers of Advancement; III. Powers of Maintenance and Education; IV. Powers of appointing Life Interests; V. Powers of making future Settlements; VI. Powers of Revocation; VII. Other Powers. It should be observed that in a settlement of personal estate all these are equitable, and not legal, powers, it being the invariable practice, and, as a general rule, absolutely necessary, to vest the settled fund in trustees, whose legal interest cannot be divested by the execution of any power, but whom equity will compel to deal with the fund according to the trusts. (See Sugden, *Powers*, 8th ed., ch. ii. pp. 45, 46.)

I. POWERS OF APPOINTMENT AMONGST ISSUE.—In a marriage settlement of the normal description, powers for this purpose are given by means of a declaration that, after the death of the husband and wife, the capital and income of the settled fund shall be held in trust for the issue of the marriage as the husband and wife shall jointly by deed appoint, and in default as the survivor shall by deed or will appoint; and the powers are followed by a trust, in default of appointment, for the children of the marriage, who, being sons, attain the age of twenty-one, or, being daughters, attain that age or marry, in equal shares, with the addition of a clause (called the HOTCHPOT clause), which provides that no child who or whose issue shall take any share by appointment, shall in default of appointment to the contrary be entitled to any share in the unappointed part without bringing the appointed share into account. The trust for children and the hotchpot clause are thus closely

associated with the powers of appointment, of which, however, they form no part. Sometimes there is substituted for the sole power to the survivor a sole power to the party by whom the fund has been settled if surviving the other; sometimes the joint power is altogether omitted, and each party has a sole power over his or her own fund; and in a voluntary settlement, where there is only one life interest, this is the common practice, the sole power being given to the life tenant in favour of his or her issue generally. The word *issue* in a power of this description means issue of every degree (*In re Warren's Trusts*, 1884, 26 Ch. D. 208), and the power is made exercisable in favour of issue instead of children (as was at one time usual), because provision can thus be made under the power for the family of a deceased, or improvident or incapable child. It is intended always that this power shall be exercisable in favour of any one or more of the objects exclusively of the others; and in order to enable that to be done, it was necessary formerly to use express words to that effect; but the law in this respect has been altered by the Powers of Appointment Act, 1874 (37 & 38 Vict. c. 37). [The enactment has not altered the construction of powers themselves] (see *In re Deakin*, [1894] 3 Ch. 565). The class of issue is very often confined in express terms to issue born, which includes those *en ventre sa mère* (*Blason v. Blason*, 1864, 2 De G., J. & S. 665; *In re Burrows*, [1895] 2 Ch. 497; *Re Wilmer's Trusts*, [1903] 2 Ch. 411), [but the rule that they are included is limited to cases where such construction of the word "born" is necessary for the benefit of the unborn child (*Villar v. Gilbey*, [1907] A. C. 139), and in a will "born" may mean on the context "those of whose existence I know" (*Re Salaman*, [1907] 2 Ch. 46)], during the life or lives of some named person or persons (usually in a marriage settlement the husband and wife), or the life of the survivor of such persons if more than one, or within twenty-one years after the expiration of such life or lives; and it is sometimes expressly provided that every or any appointee shall take a vested interest within the same period (see PERPETUITY). But for neither purpose is an express provision necessary; the rule being that under a power to a person *in esse* to appoint to issue generally, the donee may appoint to such as are born, and for interests which must vest, within the line of perpetuity (Sugden on *Powers*, p. 152; *Slark v. Dakyns*, 1874, L. R. 10 Ch. 35; *In re Hargreaves*, 1890, 43 Ch. D. 401). The perpetuity limit, allowed by law, is (it may be here observed) a life or lives in being, and twenty-one years afterwards, with the addition of the period of gestation, if gestation exists. In the application of this rule to powers of appointment of the description now under consideration, the words *in being* are to be referred to the date of the instrument creating the power (Sugden on *Powers*, p. 396, where it is pointed out that the test of the validity of estates created under a power is to place (or read) them into the instrument creating the power; and see *In re Brown & Sibly's Contract*, 1876, 3 Ch. D. 156); and it would seem (though it is nowhere expressly so laid down) that the life or lives with reference to the existence of which the appointment must be made, if none are expressly mentioned, will be the life or lives of the donee or donees, and the lives of others in existence who are interested in the fund, and mentioned or referred to in the settlement, including the objects, if any are in existence (which in the case of a marriage settlement could not be). Under a power of this description, the donee can create such interests, not obnoxious to the perpetuity rule, as he thinks fit. Thus he may appoint in shares, or for

life with a power of appointment by deed or will (*Phipson v. Turner*, 1838, 9 Sim. 227; 59 E. R. 345; 47 R. R. 229; *Morse v. Martin*, 1855, 34 Beav. 500; 55 E. R. 728; *Slark v. Dakyns*, *ubi supra*; *In re Meredith's Trusts*, 1876, 3 Ch. D. 757); though not, probably, as to a married woman unborn at the date of the settlement, with a restraint on anticipation (see *Whitby v. Mitchell*, 1890, 42 Ch. D. 494; 44 Ch. D. 85; and *Herbert v. Webster*, 1880, 15 Ch. D. 610, and cases there cited), [that is, although the appointment is good the restraint is bad (*Farw. Powers*, 2nd ed., p. 295); the restraint is good as to those *in esse* at the date of the settlement or the death of the testator (*Re Ferneley*, [1902] 1 Ch. 543)]. He may appoint by way of annuity, or to trustees for sale and division among the objects (Sugden on *Powers*, p. 406), or to trustees for the benefit of the objects (as to which, see *In re Tyssen*, [1894] 1 Ch. 56; and *In re Paget*, [1898] 1 Ch. 290, where some pertinent observations on the subject will be found, though the actual decision is immaterial, and also open to remark, as pointed out in *L. Q. R.* xiv. 123), or even to a person not an object with the approbation of the object (*In re Turner's S. E.*, 1883, 28 Ch. D. 205, 216), the transaction being treated as an appointment to the object, and also as a gift by him to the person benefited (*per Wigram*, V.-C., 1842, 2 Hare, 196; 67 E. R. 826), which of course would be good, unless procured in fraud of the power within the equitable doctrine on that subject to be presently mentioned. But he cannot without special authority delegate the power (Sugden on *Powers*, p. 129, c. vi. s. 1; and cp. *Burnaby v. Baillie*, 1889, 42 Ch. D. 282), and for this reason he is often expressly empowered to provide for the maintenance and education or advancement of the objects at the discretion of the trustees or others, and as regards advancement, either overreaching the prior interests or not (see II.). It is not usual now to require that the deed of appointment shall be executed in any particular manner, and, whatever may be the formalities required by the power, a deed attested by two witnesses will suffice. See the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 12. Upon any appointment a power of revocation may be reserved, although the power of appointment does not in terms authorise such a revocation (Sugden on *Powers*, p. 367; *In re Harding*, [1894] 3 Ch. 315); but an appointment not reserving a power of revocation is irrevocable [(see *Hall v. Hall*, 1873, L. R. 8 Ch. 430)]. See Sugden on *Powers*, p. 200, pl. 18; and as to the mode of operation of revocations and new appointments generally, c. vii. s. 9; *Wilson v. Kenrick*, 1885, 31 Ch. D. 658. It seems to be clear that a power of appointment of the description now under consideration, given to the survivor of several persons, cannot be exercised during the joint lives, even though the party appointing should in the event be the survivor (*Thomas v. Jones*, 1863, 1 De G., J. & S. 63, 78; 46 E. R. 25; and see also *In re Blackburn*, 1889, 43 Ch. D. 75). Upon the form and scope generally of powers of the description now under consideration, enough has been said; but there are some incidental points which should be mentioned. The donee of such a power (like the donee of any other special power) must execute it *bonâ-fide* for the end designed; otherwise the appointment will be regarded as a fraud upon the power, and void in equity (*Aleyn v. Belchier*, 1 Eden, 132; 63 E. R. 634; 1 White and Tudor, L. C.). Thus an appointment by a father to an infant child in a consumption with the purpose of taking the fund as her administrator, is a fraud upon the power (*Lord Hinchinbroke v. Seymour*, 1784, 1 Bro. C. C. 395; 28 E. R. 1200; explained,

Henty v. Wrey, 1882, 21 Ch. D. 332); so is an appointment upon a bargain with the appointee for a purpose not authorised by the power, or followed by communication to the appointee of the unauthorised purpose (*Topham v. Duke of Portland*, 1864, 11 H. & C. 32; *Topham v. Duke of Portland*, 1869, L. R. 5 Ch. 40; *In re Deane*, 1889, 42 Ch. D. 9); or upon an unauthorised condition which cannot be severed from the appointment, though there was no bargain (*Roach v. Trood*, 1874, 3 Ch. D. 429; *In re Kirwin's Trusts*, 1883, 25 Ch. D. 373; *In re Perkins*, [1893] 1 Ch. 283). But this doctrine does not extend to a release of the power (*In re Somes*, [1896] 1 Ch. 250); and it has been long settled that such a power (not being a power simply collateral) may be released. See Sugden on *Powers*, pp. 82 *et seq.*, 90; and as to the classification of powers not arising under the Statute of Uses, by analogy (as it is presumed) to powers so arising, *In re D'Angibau*, 1880, 15 Ch. D. 228, a case upon the execution of a power by an infant; but it must be borne in mind that since the Conveyancing Act, 1881 (s. 52), even a power simply collateral, if not coupled with a duty (*In re Eyre*, 1883, W. N.; 49 L. T. 259), may be released. Whether a married woman can release a power has been regarded as doubtful (Sugden on *Powers*, p. 92); but her capacity to do so seems to have been admitted in *Burnaby v. Baillie*, *ubi supra*, and *In re Little*, 1889, 40 Ch. D. 418, *sub silentio*, and *In re Davenport*, [1895] 1 Ch. 351. Finally, it should be observed that the power is one the defective execution of which in favour of children will be aided in equity (Sugden on *Powers*, pp. 534, 536). The trust for children in default of appointment and the hotchpot clause are outside the scope of this article, but the latter (it may be added) is inserted to prevent the application of the doctrine that an object of a power to whom a share is appointed is not excluded from taking another share of the unappointed funds (Sugden on *Powers*, p. 640; and see as to hotchpot, where one fund is settled by reference to another, *In re Marquis of Bristol*, [1897] 1 Ch. 946).

II. POWERS OF ADVANCEMENT.—A power of this description usually enables the trustee after the death of the prior life tenants or life tenant, or previously with their, his, or her consent, [if lunatic, by the committee, with authority of the Court (*Re Nevill*, 1885, 31 Ch. D. 161)], to raise any part not exceeding (as a rule) one-half of the expectant presumptive or vested share of any child under the trusts, and to apply the same for the advancement or benefit of such child. It is sometimes contended that the word *benefit* in such a power only extends to matters *ejusdem generis* with advancement; but the contention is probably wrong (see *Louther v. Bentinck*, 1874, L. R. 19 Eq. 166; *In re Breeds's Will*, 1875, 1 Ch. D. 226; *In re Gore's Settlement Trusts*, 1879, W. N. p. 79; and (as being *in pari materia*) *Taylor v. Taylor*, 1875, L. R. 20 Eq. 155; *In re Blockley*, 1885, 29 Ch. D. 250; *In re Price*, 1887, 34 Ch. D. 603). However, it may be as well in appropriate cases to mention expressly, amongst the purposes for which money may be raised, such purposes as university professional or technical education (*Roper Curzon v. Roper Curzon*, 1871, L. R. 11 Eq. 452), and the provision of a portion or outfit for a daughter on marriage. The power as above described applies only to a child's share under the trusts; and it is apprehended that this is right, for an appointment takes the appointed share wholly out of the settlement (Sugden on *Powers*, p. 467); and the proper course is to enable the donee or donees of the power of appointment to provide for the advancement of appointees, for which purpose such donee or donees

must be authorised, as before explained, to delegate the power, and also to overreach the prior interests (see, however, *White v. Grane*, 1854, 18 Beav. 571; 52 E. R. 224). It should be noted that alienation by a tenant for life whose consent is required, does not extinguish his right to consent; but such consent may still be given, with the concurrence or sanction of the alienee (*In re Cooper*, 1884, 27 Ch. D. 565; *In re Beddingfield and Herring's Contract*, [1893] 2 Ch. 332).

III. POWERS OF MAINTENANCE AND EDUCATION.—It was the practice formerly to direct that the trustees should, after the death of the life tenant or life tenants, apply all or such part as they might think fit of the income of the expectant share of any child under the trusts (which, as observed in II., is thought to exclude an appointed share) for or toward the maintenance or education of the child, and should accumulate the residue (if any) for the benefit of the person becoming entitled to the principal, but with power to resort to accumulations, and apply them as if they were income. The clause, it will be observed, took the form of a trust, rather than of a power. Sec. 26 of Lord Cranworth's Act, 23 & 24 Vict. c. 145, was intended to render the clause unnecessary (*In re Cotton*, 1875, 1 Ch. D. 232); but the practice of inserting such a clause continued notwithstanding. Now it has been superseded by sec. 43 of the Conveyancing Act, 1881, which effectually supplies its place where the trust in default of appointment is in the form indicated in No. I. (*In re Holford*, [1894] 3 Ch. 30; see also *In re Moody*, [1895] 1 Ch. 101; *In re Woodin*, [1895] 2 Ch. 309; *In re Jeffery*, [1895] 2 Ch. 577). Where, however, the trust is so expressed as to give the infant a vested but defeasible interest (*In re Buckley's Trusts*, 1883, 22 Ch. D. 583), and also in the case of an infant life tenant (*In re Wells*, 1889, 43 Ch. D. 281; *In re Humphreys*, [1893] 3 Ch. 1), [and also where the gift is contingent and does not carry intermediate income (*Re Bowlby*, [1904] 2 Ch. 685)], the destination of accumulations should be expressly provided for. [If a lawful trust for accumulation is inserted in the settlement, with no provision for maintenance during such accumulation, the Court will not, in the absence of special circumstances, order maintenance (*Re Alford*, 1886, 32 Ch. D. 383).] And it must be noticed that the statutory power is not exercisable after minority (*In re Breed's Will, ubi supra*), nor does it apply where the interest is less than a life interest. [Care should be taken in framing a power of maintenance that it does not in itself infringe the rule against perpetuities (*Re Blew*, [1906] 1 Ch. 624).] It may be added that the institution of an action for the administration of the trusts, though it paralyses the powers of the trustees, and disables them from exercising such powers otherwise than under the direction of the Court, does not take away their discretion, or justify the Court in interfering with such discretion (*In re Bryant*, [1894] 1 Ch. 324).

IV. POWERS OF APPOINTING LIFE INTERESTS.—It is seldom that a simple power of this description is introduced into a marriage settlement. But in a voluntary settlement for the benefit of an individual and his or her family, where no life interest is given to the wife or husband of the principal beneficiary, such principal beneficiary is commonly authorised by deed (executed in contemplation of marriage or otherwise) or will to appoint that after his or her death, all or any part of the income of the settled fund shall be paid to his or her surviving wife or husband, for the life of such wife or husband, or for any less period, and with or without restriction. In settlements of this kind

it is, generally speaking, more prudent to introduce such a power in lieu of giving a life interest to the wife or husband; and if the principal beneficiary be unmarried at the date of the settlement, a life interest to the wife or husband should never be given, both because the character of such wife or husband must necessarily be unknown, and because she or he may be a person unborn at the date of the settlement, and risks of infringing the perpetuity rules will be incurred (see *In re Harvey*, 1888, 39 Ch. D. 289; *In re Frost*, 1889, 43 Ch. D. 246; and also *In re Abbott*, [1893] 1 Ch. 54).

V. POWERS OF MAKING FUTURE SETTLEMENTS.—Upon the marriage of a young woman possessed of any considerable property, where the whole of her property is settled, it is matter of course to introduce into the settlement a power for her to make a settlement on a future marriage (see *Rudge v. Winnall*, 1848, 11 Beav. 607; 50 E. R. 753). This power is usually not made exercisable by her until she has survived her intended husband. It enables her to appoint a specified aliquot part of the settled fund, or a part varying with the number of the children of the intended marriage, in favour of a future husband, and the issue of a future marriage.

VI. POWERS OF REVOCATION.—A general power to revoke the trusts is seldom introduced into a marriage settlement. In a voluntary settlement such a power is not unusual; and there are cases in which the absence of such a power has led to the settlement being set aside or treated as revocable, but of course the settlement is not invalidated by the mere fact of such a power not being found (*James v. Couchman*, 1885, 29 Ch. D. 213). The power is generally made exercisable by deed, and often with the consent of the trustees, and so that their discretion as to giving or withholding consent shall be absolute and uncontrollable. It should enable the donee not only to revoke or vary the trusts, but also to declare (by way of new appointment) other trusts for the benefit of himself, his executors or administrators, or otherwise (*Eland v. Baker*, 1861, 29 Beav. 137; 54 E. R. 579); [and in such a case on a new declaration of the trusts of the settlement, it may not become necessary to pay *ad valorem* stamp duty for the second time (see *Russell v. I. R. Commissioners*, [1902] 1 K. B. 142)]. A mere revocation without more would cause a resulting trust for the settlor or his representatives.

VII. OTHER POWERS.—Only the most important of these can be mentioned, viz.—(1) Power for a wife to dispose of the fund settled by her or on her behalf in default of issue. This is a usual power in a marriage settlement, and also *mutatis mutandis* in other settlements upon a woman and her issue. It takes the form generally of a declaration that, if there shall be no child who attains a vested interest under the preceding trusts, then, subject to those trusts, the capital and income of the fund, or so much of both as shall not have become vested or been applied under any of the trusts and powers contained or by statute implied in the deed, shall be held in trust for such person or persons and purposes as the wife shall, when discovert, by deed, or, whether covert, or discovert, by will, appoint. In default of appointment, the trusts are, if the wife survives the husband, for her absolutely, but as her separate property without power of anticipation during the intended coverture, and if the husband survives the wife, then for a class of persons commonly described as her statutory next-of-kin, excluding her husband. The present article is not concerned with these trusts,

but it will be observed that there are really two powers, one exercisable by deed, and the other by will, and that the absolute trust for the wife, if she survives her husband, seems to render both useless or superfluous in that event. In fact, the first contemplates the possibility of a divorce, and is intended to enable the wife to dispose of the fund after divorce, and the powers and trusts combined are intended to preserve to the wife complete dominion over the fund independently of her husband, but subject, of course, as above appears, to the prior interests. [Divorce does not determine the operation of the settlement or forfeit the right of the guilty party (*Fitzgerald v. Chapman*, 1875, 1 Ch. D. 563; *Burton v. Sturgeon*, 1876, 2 Ch. D. 318).] (2) Power to lend all or part of the funds to the husband or some other interested person with or without security. In this case the trustees must be protected from liability for not calling in the money. (3) Power for the trustees to keep up life policies comprised in the settlement out of the other settled funds. In this case the trustees must be protected from liability for not exercising the power, or for the policies becoming void by any means whatever. (4) Power to invest in the purchase of land or a house. Such an investment is outside the usual scope of an investment clause, and the purchased property should be subjected to a trust for sale, trusts of the net moneys produced by the sale being declared by reference to the trusts of the settled fund, though it would appear that a mere referential trust of the land itself would have much the same effect (*Tait v. Lathbury*, 1865, L. R. 1 Eq. 174; *In re Garnett Orme and Hargreave's Contract*, 1883, 25 Ch. D. 595). The power is usually made exercisable only during the lives of the life tenants, or the life of the survivor of them, with their, his, or her consent in writing. (5) Power to withdraw absolutely part of the settled funds. This may be given either in the form of a power of appointment in favour of the donee, his executors, administrators, or assignees, or in the form of a general power of revocation and new appointment extending only to the part permitted to be withdrawn.

Upon the law of powers generally, see POWERS. Sugden is still the standard authority; but Chance on *Powers*, though seldom referred to, is a learned, accurate, and comprehensive work. Mr. Farwell's excellent book on *Powers* has reached a second edition; and Vaizey on *Settlements* deals fully with the subject of this article.

Powers to appoint New Trustees.—See POWERS; TRUSTS.

Poyning's Act.—See IRELAND, Vol. VII., at pp. 429, 431.

Practicable.—Under some statutes a person may, although he does a prohibited act, be protected if he has complied with the enactment "as far as practicable." Now it is always possible to do nothing, so that in general all rules are practicable; wherefore, when such words occur, they must be treated as qualifying the prohibition to some extent. Thus in the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 91, factories, workshops, and workplaces are directed to be kept in a cleanly state and ventilated, so as to render innocuous, *as far as practicable*, all gases, vapours, etc.; and under the same section a fireplace or furnace which does not, *as far as practicable*, consume its smoke is liable to be dealt with summarily as a nuisance. In that section evidently the intention

is not to prohibit gas, vapour, or smoke entirely, but to keep it within certain limits. So in the Coal Mines Regulation Act, 1872, 35 & 36 Vict. c. 76, s. 51, it is enacted that certain regulations are to be carried out as far as is reasonably practicable; and under that section it was held that the words referred to physical or engineering difficulties in the way of carrying out the rules, and not to the carrying on of the mine as a profitable concern (*Wales v. Thomas*, 1885, 16 Q. B. D. 340). If the direction is to carry out a set of affirmative and negative rules, however, so far as is reasonably practicable, the qualification would not appear to apply to the negative rules (*Wales v. Thomas*, *supra*). For another instance of the use of the word, reference may be made to the Animals Order, 1871, issued by the Privy Council under the Contagious Diseases (Animals) Act, 1869, 32 & 33 Vict. c. 70, s. 75, which directs notice to be given "with all practicable speed." These words were held to imply that no offence was committed until the person was aware of the animal being diseased. Frequently the phrase "as far as practicable" will be synonymous with "as far as possible" (cp. *Cooper v. Woolley*, 1867, L. R. 2 Ex. 88).

Practice and Procedure.—According to Lord Westbury in *A.-G. v. Sillem*, 1864, 10 H. L. 704, the word "practice" in its common and ordinary sense denotes the rules that make or guide the *cursus curiæ*, and regulate the proceedings in a cause within the walls or limits of the Court itself. So it does not imply or involve anything relating to the extent or nature of its jurisdiction. In the Queen's Remembrancer's Act, 1859, 22 & 23 Vict. c. 21, s. 26 (now repealed), the word is found closely associated with the terms, process, and mode of pleading, but the pleadings in an action are not strictly practice, though a not unimportant part of the proceedings. The rules of Court, however, as to the form and time for lodging pleadings, etc., properly come within the term. Even proceedings on execution, though coming after judgment, and when a case has left the hands of the Court, are treated of in modern books of practice. And though the right to appeal to a superior Court is not practice of the inferior Court, yet the rules regulating appeals may in part relate thereto. To sum up, the term will properly include the form and manner of instituting and conducting civil actions and criminal prosecutions through their various stages, from the commencement to final judgment and execution, according to the rules and regulations laid down by or under the statutes governing judicial proceedings.

Under the Law Terms Act, 1830, 11 Geo. iv. & 1 Will. iv. c. 70, s. 1 (repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59), a common-law judge was appointed, who held a special Court for practice matters, such as motions for new trials, or for writs of mandamus and prohibition.

At the present time the term "practice and procedure" derives special significance from sec. 1 (4) of the Judicature (Procedure) Act, 1894, which provides that "in matters of practice and procedure every appeal from a judge shall be to the Court of Appeal." Prior to this enactment appeals from the judge in chambers (King's Bench) lay in the first instance to the Divisional Court. The judge in chambers exercised two kinds of jurisdiction, namely, as the representative of the High Court to hear original applications to the Court under various statutes or under the common law, and as the judge sitting to hear

appeals from the Masters in all actions and matters pending in the High Court (see CHAMBERS, JUDGES', Vol. II. p. 644). It has been held that the words "practice and procedure" in the above section refer only to the latter, and do not include original applications to the Court, such as for a prohibition to restrain an inferior Court from exceeding its jurisdiction (*Watson v. Petts*, [1899] 1 Q. B. 54, C. A.).

Præcipe.—A præcipe is a printed form bearing the Court fee, which is filed on taking certain proceedings, such as searching records, issuing writs other than an original writ of summons, entering an action or matter for trial or appeal, etc. It must contain the title of the action, the reference to the record, and particulars of the proceeding to which it refers. In the case of a writ of execution, the particulars given must include the date of the judgment and of the order (if any) directing the execution to be issued, and the names of the parties against whom, or of the firm against whose goods, the execution is to be issued; and must be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if he does so in person (R. S. C., Order 42, r. 12).

"Præcipe" was formerly the name for "an original writ in the alternative, commanding the defendant to do the thing required, or show the reason for not doing it, and drawn up in the form of a præcipe (or command) to do the thing, or show cause to the contrary; giving the defendant his choice, to redress the injury or stand the suit" (3 Black. Com., 274); and a *præcipe in capite* was a writ of right (an original writ) for an immediate tenant of the King (*ibid.*, 195). A person in possession of an estate of freehold, who suffered a recovery (a collusive action) to be brought against him, in order to bar an estate tail together with the remainders and reversion, was called the "tenant to the præcipe." Recoveries were abolished by the 3 & 4 Will. IV. c. 74, and this kind of original writ is now also abolished.

Prædial Tithes.—See TITHES.

Præmunire; Premunire, corrupted form, or apparently synonymous with, *præmoneri*, "to be forewarned." It is an offence so called from the words of the writ preparatory to the prosecution thereof: "*præmunire facias* A. B. (cause A. B. to be forewarned) that he appear before us to answer the contempt wherewith he stands charged." It took its origin from the exorbitant power claimed and exercised in England by the POPE, and was originally ranked as an offence against the King, because it consisted in introducing a foreign Power into this land.

The Church of Rome took on herself to bestow most of the ecclesiastical livings of any worth in the Church of England by mandates before they were void, pretending therein great care to see the Church provided of a successor before it needed. These provisions were so common, that at last it was necessary to restrain them by the laws of the land.

In the thirty-fifth year of the reign of Edward I. was made the first statute against papal provisions (35 Edw. I. st. 1). It was, according to Coke, the foundation of all the subsequent statutes of *præmunire*.

The 16 Rich. II. c. 5 is the statute generally referred to by all subsequent statutes, and is usually called the *Statute of Præmunire*. It enacts that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things which

touch the King, against him, his crown and realm, and all persons aiding and assisting therein, shall be put out of the King's protection, their lands and goods forfeited to the King's uses; and they shall be attached by their bodies to answer to the King and his Council; or process of *præmunire facias* shall be made out against them as in other cases of provisors. By 2 Hen. iv. c. 3, all persons who accept any provision from the Pope to be exempt from canonical obedience to their proper ordinary, were also subjected to the penalties of *præmunire*. This is said to be the last ancient statute concerning this offence till the Reformation.

Whenever it is said that a person by any act incurs a *præmunire*, it is meant to express that he thereby incurs the penalties which, by the various statutes that have been passed relating to that offence, are inflicted for the offences therein described.

At the time of the Reformation the penalties of *præmunire* were extended to more papal abuses than before. And therefore by the Statutes 24 Hen. viii. c. 12; 25 Hen. viii. cc. 19, 21, to appeal to Rome from any of the King's Courts, which (though illegal before) had at times been acquiesced in, to sue to Rome for any licence or dispensation, or to obey any process from thence, became subject to the pains of *præmunire*. By 25 Hen. viii. c. 20, it is enacted that if the dean and chapter refuse to elect to a vacant bishopric the person named by the King, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the Statutes of *Præmunire*. As to this, see *R. v. Archbishop of Canterbury*, 1848, 11 Q. B. 483.

The penalties of *præmunire* were subsequently applied to other heinous offences in no way connected with papal aggression, *e.g.* to assert maliciously and advisedly, by speaking or writing, that both Houses or either House of Parliament have or has a legislative authority without the Sovereign, is still a *præmunire* by 13 Car. ii. c. 1.

By the Habeas Corpus Act, 31 Car. ii. c. 2, it is still a *præmunire*, and incapable of the royal pardon, besides other heavy penalties, to send any subject of this realm a prisoner, under certain exceptions specified in the Act, into parts beyond the seas.

Prayer-book; Book of Common Prayer.—

Gregory the Great directed St. Augustine, the first Archbishop of Canterbury, "to select from each church those things that are pious, religious, and correct," and when such selection was made, to "instil them into the minds of the English for this use" (Greg. *Opera*, vi. 1151, Bened. ed.; Bede's *Ecc. Hist.*, i. 27); and articles 20 and 34 of the Thirty-Nine Articles declare that the Church "hath power to decree rites and ceremonies," and that "every particular or national Church hath authority to ordain, change, and abolish ceremonies or rites of the Church ordained only by man's authority, so that all things be done for edifying." Some attempts were made at securing uniformity of service in the Anglo-Saxon period, but not altogether with success. After the Norman Conquest the Sarum Breviary and Missal (on which the present Prayer-book is largely based) was drawn up by St. Osmund, Bishop of Salisbury and Chancellor of England, and adopted for the Cathedral Church of Salisbury in 1085. This compilation, with some variations, became the General Use in the province of Canterbury, with the exception of the dioceses of Lincoln, Hereford, and Bangor, which had their own Uses. There was also a separate Use for the province of

York, although in the diocese of Durham the Sarum Use prevailed. There was also, down to 1417, a separate Use for St. Paul's Cathedral. All these services were in Latin, but during the Middle Ages there existed primers for the use of the laity, *e.g.* the *Lay Folks Mass Book*. Generally, it may be stated that until the Reformation the authority of the bishop determined the use of forms of services in all the churches in each diocese. One of the leading, and certainly the most popular feature of the Reformation, was the introduction of the vernacular prayer-book. But although the demand for this reform was frequently made, no alteration of great importance was made in the mass-books, breviaries, and other rituals during the reign of Henry VIII. except the omission of the collects for the Pope and the offices of certain saints; but by a canon of the Convocation of the Province, 1542, a reformed edition of the Sarum Breviary was apparently authorised for the whole province of Canterbury, in respect of the Hours' services (see Wilkins, *Concilia*, iii. 381). In 1542 a Committee of Convocation was appointed to reform the existing book of offices, and in 1544 it published the Litany in English. Some writers take the view that in Henry Eighth's reign further liturgical reforms were accomplished (see evidence to the Report of the Royal Commission on Ecclesiastical Discipline, and MacColl, *The Royal Commission and the Ornaments Rubric*).

After the death of Henry VIII. progress became more rapid. In 1548 an order of communion, which is practically identical with part of the present communion service, was interpolated in the Latin Mass (which was not otherwise altered), after the priest's communion. In 1548 the first prayer-book of Edward VI. was completed. This book was mainly composed from the Salisbury Use, but certain portions of it were taken from the Reformed Roman Breviary of Cardinal Quignon, and also from certain Lutheran sources, the Consultation of Archbishop Hermann, and the Nuremberg Mass-Book.

The chief features of the book are, that the services of the canonical hours are replaced by Matins and Evensong, which were constructed by a translation, alteration and adaptation of the offices of Matins, Lauds, and Prime, Vespers and Compline, which were made congregational. The Litany above referred to, with some alterations, was added to the book. The calendar was reformed, and a table of lessons, including the whole Bible, and omitting other writings, was introduced. The Mass was described as the "Supper of the Lord or the Holy Communion, commonly called the Mass." This service was in the main taken from the Latin rite, but with considerable alterations, the aim being that the whole of the canon should be said openly. The elevation of the host and other ceremonies were dropped.

Other offices, *e.g.* for Baptism, Confirmation, Solemnisation of Marriage, etc., were also added, being in the main adapted from the ancient service books. (As to the plan of the work further, see Preface; see also Blunt, *Annotated Book of Common Prayer*. As to vestments and ornaments authorised under it, see articles ORNAMENTS RUBRIC; VESTMENTS.)

The rubrics of this prayer-book are certainly very scanty, and it has been considered that they presuppose the retention of the ancient gestures and ceremonies in use at the mediæval worship. The question is one of keen controversy. No doubt when a Prayer-book rubric deals with a point it is decisive. However, when a point was left open it was apparently the general view of the sixteenth century,

if we may judge from the language of episcopal injunctions, that the matter might be regulated by some other ecclesiastical authority. In modern times, however, ecclesiastical Courts have taken the view that all ceremonies and questions not expressly ordered by the rubrics are implicitly prohibited (see further article UNIFORMITY, ACTS OF).

The first Act of Uniformity, 2 & 3 Edw. VI. c. 1, Book of Common Prayer Act, 1548 (as to which further, see article UNIFORMITY, ACTS OF), directed that all ministers in any cathedral or parish church should say and use the services mentioned in this prayer-book "in such order and form as is mentioned in the same book, and none other or otherwise."

An Act passed in the next year, 3 & 4 Edw. VI. c. 10, Books and Images Act, 1549-50, directed the destruction of the old service books.

In 1550 the new ordinal was introduced (see HOLY ORDERS). A revised edition of the prayer-book was prepared in 1552. This book differed considerably from the former one. Many new prayers were added, and the baptismal service was somewhat altered; but the most important changes were made in the holy communion service, which was no longer called the Mass. The prayers for the souls of the faithful departed were omitted from it, the order of the service was rearranged, and the words of administration were altered. Reservation of the sacrament was forbidden. This book never obtained the approval of Convocation; but it was established by the Act 5 & 6 Edw. VI. c. 1, Uniformity of Common Prayer, 1551-2. This Act states that the first prayer-book was "a very godly order for common prayer and the administration of the sacraments, agreeable to the Word of God and the Primitive Church; but (s. 4) because there had risen in the use and exercise of common service in the Church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the ministers and mistakers thereof than of any worthy cause; therefore, as well as for the more plain and manifest explanation thereof, as for the more perfection of the said order," the book had, by the authority of King and Parliament, been "proved, explained, and made fully perfect, and annexed to this statute" (though this, as a matter of fact, was not done), "adding also" the ordinal "to be of like force, authority, and value as the same like aforesaid book, entitled the book of common prayer, was before;" and with the same clauses of provisions and exceptions to all intents and purposes as by the Act 2 & 3 Edw. VI. c. 1 was limited and expressed "for the uniformity of the service and administration of sacraments throughout the realm." The Act provides that the provisions of the former Act are to apply in all respects to the enforcement of the present book.

Several alterations, *e.g.* the Black Rubric, which deals with the meaning to be attached to the act of kneeling at the reception of the holy communion, were made to this book without any parliamentary or other legal authority.

After the temporary suppression of the English prayer-book by the Act 1 Mary, c. 2, s. 2, Elizabeth, who succeeded Mary, in 1558 made for a time no serious alterations in divine service (see *Gibs. Cod.* 1554, vi. p. 267).

It was finally decided to restore the second prayer-book of Edward VI. with some alterations, most of which were important, and were chiefly made, it is supposed, with the view of removing the apparent denial

of the Real Presence, which might appear to be contained in that book, and a bill was introduced into Parliament to effect this. The Black Rubric was omitted, the old words of administration at the holy communion were restored and added to the new. A proper table of lessons was also prefixed, and an alteration was made in the Litany (see further, articles ORNAMENTS RUBRIC; VESTMENTS; UNIFORMITY, ACTS OF). This prayer-book was established by the Act of Uniformity, 1558-9, 1 Eliz. c. 2.

Under a power given in this Act (s. 3) (see articles UNIFORMITY, ACTS OF; ORNAMENTS RUBRIC), the Queen in 1561 authorised certain small revisions as to the calendar, etc.; and under the same power James I. in 1604 introduced a few further changes, including the latter part of the Catechism, which deals with the sacraments, and an alteration in the rubrics of the baptismal service (see article BAPTISM).

The Puritan Revolution temporarily suppressed the prayer-book. After the Restoration an abortive attempt at a compromise between Churchmen and Presbyterians followed, but no arrangement could be effected between the two parties, and the revision of the prayer-book was intrusted by the Crown to the Convocations of the two provinces. Altogether six hundred alterations are said to have been made in the book at the time of this revision. Several new prayers were introduced, including those for Ember Week, the High Court of Parliament, all conditions of men, and the general thanksgiving. Some new collects and offices were also introduced. In the service of holy communion, the clause respecting saints departed was added to the prayer for the Church militant. The ceremonies of the fraction and oblation of the bread were introduced, and the Black Rubric above mentioned was restored, but with an important difference, that the words "real and essential presence" were altered into "corporal presence." The word "priest" was substituted for pastor or minister in several places, and further rubrics were inserted, and an alteration was also made in the ordinal (see article HOLY ORDERS).

The prayer-book as altered by Convocation received legislative force under the Book of Common Prayer Act of Uniformity, 1662, 14 Car. II. c. 4.

This Act provides that the ministers in any cathedral, collegiate, or parish church or chapel or other place of public worship within England and Wales shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both sacraments and all other the common prayer in such order and form as is mentioned in the said book annexed and joined to this present Act. (As to penalties imposed under this Act, see UNIFORMITY, ACTS OF; and as to Wales, see article WALES.)

For the safe keeping and preservation of the book in question, sec. 24 provides that the deans and chapters of every cathedral church within England and Wales shall, before December 25, 1662, obtain under the Great Seal a true and perfect copy of the Act and the book annexed thereto, to be by them and their successors kept and preserved in safety, and to be also produced and showed forth in any Court of Record as often as lawfully required; and also that there shall be delivered true and perfect copies of this Act and of the same book into the respective Courts at Westminster, and into the Tower of London, to be kept and preserved for ever among the records to be produced and showed forth

in any Court as need shall require. The section provides that such copies so to be exemplified under the Great Seal shall be examined with the original and certified, and thereupon accounted good records. Sec. 21 provides that prayers relating to the Sovereign and Royal Family may be altered as required.

The copies of the original book in the Act mentioned, examined, compared, certified, and exemplified, as mentioned above, became as good records as the book itself, and are generally known as the Sealed Books. The original book and the Sealed Books are part of the statute law, and any addition to the prayer-book not therein mentioned is illegal. The original book, which was lost after 1824, has been recently discovered, and is now placed in the same division of the press as the Act.

(In view of the legislative union of the Churches of England and Ireland, 39 & 40 Geo. III. c. 67, certain changes were directed, by Order in Council, January 1, 1801, to be made in the prayer-book to give effect to that provision. See Stephen's *Book of Common Prayer*, Introduction, p. clxxxviii. Owing to the separation of this union by 32 & 33 Vict. c. 42, it is not necessary to discuss them.)

The Table of Lessons Act, 1871, 34 & 35 Vict. c. 37, passed on the report of a Royal Commission, substituted a new table of lessons for use in the Church in place of the lessons formerly ordered, and this table is the one now printed in the Book of Common Prayer. (As to the Act further, see article UNIFORMITY, ACTS OF.)

By the Act of Uniformity Amendment Act, 1872, 35 & 36 Vict. c. 35, made in accordance with the report of the Ritual Commission, a shortened form of morning and evening prayer set forth in the schedule to that Act, which schedule is to be taken as part of the Act, is authorised to be used in a cathedral in addition to and in a church in lieu of the order for morning or evening prayer prescribed by the Book of Common Prayer on any day except Sunday, Christmas Day, Ash Wednesday, Good Friday, and Ascension Day. (As to the other provisions of the Act, see article UNIFORMITY, ACTS OF.)

See also articles RUBRIC; UNIFORMITY, ACTS OF, under which latter the subjects of the use of services other than those provided by the prayer-book and also the offence known as "the depraving of the Book of Common Prayer" are treated, and see also article INCUMBENT. (As to Welsh Prayer-book, see article WALES.)

[*Authorities.*—Lindwood, *Prov.*; Gibs. *Cod.*; A. J. Stephen, *Book of Common Prayer*, with Notes; Blunt, *Annotated Book of Common Prayer*; Phillimore, *Ecc. Law*, 2nd ed.; Frere, *Principles of Religious Ceremonial*; Gee, *Elizabethan Settlement of Religion*; Report of the Royal Commission on Ecclesiastical Discipline.]

Prayers for the Dead.—It is clearly established by decisions in the English Courts that trusts for saying masses for the souls of the dead are void as superstitious, though not actually within the terms of the statute dissolving chantries, 1547, 1 Edw. VI. c. 14 (*West v. Shuttleworth*, 1835, 2 Myl. & K. 684; 39 E. R. 1106; 39 R. R. 327; *Heath v. Chapman*, 1854, 2 Drew. 417; 61 E. R. 781; *In re Blundell*, 1861, 30 Beav. 360; 54 E. R. 928; *In re Elliott*, 1891, 39 W. R. 297); but in Ireland such gifts have been in some cases held not illegal, though in other cases held void as creating a perpetuity (see *Bradshaw v. Jackman*, 1887, 21 L. R. Ir. 12; *Dorsian v. Gilmore*, 1884, 15 L. R.

Ir. 69). For a summary of both English and Irish cases, see Tyssen on *Charitable Bequests*, ch. v.

As to the question whether prayers for the dead are lawful in the Church of England, it is certain that no such prayers occur in the Book of Common Prayer, at all events in direct terms, but in a judgment given in 1838 by Sir H. Jenner, Dean of Arches (*Breeks v. Woolfrey*, 1 Curt. 880), it was declared that, although the Church of England has "discouraged prayers for the dead," yet, "by no canon or authority of the Church has the practice of praying for the dead been expressly prohibited." In that case, the following inscription—

Spes mea Christus. Pray for the soul of J. Woolfrey. It is a holy and wholesome thought to pray for the dead. 2 Maccabees xii. 45.

had been placed by a widow on her husband's tombstone, and the application made for its removal was rejected by the learned Dean of Arches. Citing this case, the Royal Commissioners on Ecclesiastical Discipline say in their report (1906): "The Church of England has never formally condemned prayers for the dead, as distinguished from their public use in her services."

In a more recent case, Dr. Espin, Chancellor of the Diocese of Chester, refused to sanction an inscription containing an invitation to pray "for the soul" of the departed, but permitted instead the use of the words "*Requiescat in pace*" (*Egerton v. All of Odd Rode*, [1894] P. 15). In a still later case, where without authority from the incumbent a tombstone had been erected in a parish churchyard with the inscription, "Of your charity pray for the repose of the souls of _____," a faculty was decreed by Chancellor Tristram, in the Consistory Court of Ripon, authorising the incumbent to remove the tombstone (*Pearson v. Stead*, [1903] P. 66).

"Mortuary celebrations" of the holy communion, for "the repose of the departed," were condemned by Sir R. Phillimore, Dean of Arches, in *Elphinstone v. Purchas*, 1870, L. R. 3 Ad. & Ecc. 66, following the rule as to additional rites and ceremonies laid down by the Judicial Committee in *Martin v. Mackonochie*, 1868, L. R. 2 P. C. 365; L. R. 3 P. C. 52.

Pray in Aid.—See AID BY VERDICT AND (AID) PRAYER.

Preamble.—The proper function of a preamble is to explain certain facts which are necessary to be explained before the enactments contained in an Act of Parliament can be understood. For instance, the Courts of Justice Building Act, 1865, explains in the preamble the origin of the funds which were to be applied in the construction of the New Courts of Justice. A preamble may also be used for other reasons: to limit the scope of certain expressions, or to explain facts or introduce definitions (see Thring, *Practical Legislation*, 2nd ed., p. 92).

In the *Sussex Peerage Case*, 1844, 11 Cl. & Fin., at p. 143, in the opinion of the judges, it is stated that "if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief-Justice Dyer, is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'" In the case of the *Overseers of West Ham v. Hcs*, 1883, 8 App. Cas., at p. 388, Lord

Blackburn said: "In construing an Act of Parliament, where the intention of the legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely that it shows us what the legislature are intending; and if the words of the enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material."

[*Authorities*.—Craies on *Statute Law*, 1907; Maxwell, *Interpretation of Statutes*, 4th ed.; Beale, *Cardinal Rules of Legal Interpretation*.]

Pre-audience.—The precedence of being heard, which prevails at the bar according to the rank which counsel respectively hold. In the old Court of Exchequer there were two barristers appointed by the Lord Chief Baron, called the *post-man* and the *tub-man* (from the places in which they sat), who took precedence in motions (3 Black. Com., 28). See PRECEDENCE, PATENT OF.

Prebend ; Prebendary.—A prebend is an endowment in land or money given to a cathedral or collegiate church *in præbendam*, that is, to maintain or support a secular priest or a regular canon, known as a prebendary. Prebendaries are of two kinds, simple and dignitary. A *simple* prebendary has no cure, and has only his prebend for his support; while a *dignitary* prebendary has a jurisdiction annexed. A prebendary may be generally defined as one who "has a stall in the choir and a vote in the chapter of a cathedral church." By the Statute 3 & 4 Vict. c. 113, s. 1, all members of the chapter of a collegiate or cathedral church (other than the dean) are to be styled canons. As to prebendaries further, see article DEAN AND CHAPTER.

[*Authorities*.—Phillimore, *Eccl. Law*, 2nd ed.; Cripps, *Laws of the Church and Clergy*.]

Precarium.—In Roman law this was a contract *ex re* whereby the usufruct of a thing was granted by its owner under the reservation that the latter might determine such usufruct at any moment (*Dig.*, 43, 26, 4, 1). Hence the word *precarius* came to mean uncertain. As the owner was not in possession he was enabled to recover the thing granted by means of the possessory interdict *de precario* (*Dig.*, 43, 26, 2 pr.). Not only movables, but land and servitudes, might be so granted (*Dig.*, 43, 26, 15, 2). So this seems to have been the nature of the interest which clients got from their patrons in the *ager publicus*. The term is used in Scots Law to denote a loan at will, as distinguished from one on time or for a special occasion (see Bell's *Principles of the Law of Scotland*, s. 195; Erskine's *Institutes*, 3, 1, s. 20; Van Leeuwen, 349).

Precatory Trusts.

TABLE OF CONTENTS.

I. Definition	422	V. The Modern Doctrine as to Precatory Trusts	425
II. Mode of Creating Precatory Trusts	422	VI. Interest taken by the Donee of a Precatory Gift	426
III. Requisites of a Precatory Trust	422	VII. How a Precatory Trust must be Executed	426
IV. Words that have been held sufficient to raise a Precatory Trust	423		

I. *Definition*.—The term “precatory” only has reference to forms of expression (*per* Lindley, L.J., in *In re Williams, William v. Williams*, [1897] 2 Ch., at p. 19); and a precatory trust is one expressed by words of entreaty, recommendation, hope, or desire that the legatee or devisee under a will, or the grantee under a deed, will treat the gift as being for the benefit of other persons, exclusive of, or including himself (*Godefroi's Trusts and Trustees*, 2nd ed., p. 144; 3rd ed., 1907, p. 165).

II. *Mode of Creating Precatory Trusts*.—These trusts are usually created by will; but the doctrine on which they rest does not apply to wills exclusively, but extends likewise to settlements *inter vivos* (*Liddard v. Liddard*, 1860, 28 Beav. 266; 54 E. R. 368; *per* Lopes, L.J., in *Hill v. Hill*, [1897] 1 Q. B., at p. 488; Lewin on *Trusts*, 9th ed., p. 138; 11th ed., 1904, p. 145); and, *semble*, there is no reason why a precatory trust should not be expressed in any letter or memorandum properly worded (*Hill v. Hill, ubi supra*; and see *McCormick v. Grogan*, 1869, L. R. 4 H. L. 82; *Rowbotham v. Dunnett*, 1878, 8 Ch. D. 430, which were cases of secret trusts). Moreover, just as other trusts, outside sec. 7 of the Statute of Frauds, 29 Car. II. c. 3, can be treated by word of mouth (see *per* Lord Selborne, in *Lyell v. Kennedy*, 1889, 14 App. Cas., at p. 457; *Norris v. Frazer*, 1873, L. R. 15 Eq. 318), so, in like manner, can a precatory trust. Thus in *Irvine v. Sullivan*, 1869, L. R. 8 Eq. 673, where, shortly before the date of his will, a testator verbally expressed to D. his wish that she would, out of the property which he should leave her, make gifts to certain persons, and, afterwards, by his will, bequeathed the residue to her absolutely, “trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted,” it was held that D. took the residue of the testator’s estate beneficially, but subject, nevertheless, to the performance of the testator’s wishes verbally communicated to her, and which she had written down, at her own accord, and without submitting the paper to him for his signature (see also *Wood v. Cox*, 1836, 1 Keen, 317; 48 E. R. 329; 45 R. R. 156; *In re Fleetwood, Sidgreaves v. Brewer*, 1880, 15 Ch. D. 594; *per* Lopes, L.J., in *Hill v. Hill*, [1897] 1 Q. B., at p. 488; *Re Hetley*, [1902] 2 Ch. 866).

III. *Requisites of a Precatory Trust*.—The effect of the older authorities on this subject (which it will presently be seen must not be extended) was, that when property was given absolutely to any person, accompanied by words of recommendation, entreaty, request, hope, or wish, such words were sufficient to create a precatory trust in favour of other persons, if the words used were, upon the whole, capable of being construed as *imperative* (Brëtt’s leading cases in *Modern Equity*, 3rd ed., p. 19; see *per* Stuart, V.-C., in *Eaton v. Watts*, 1867, L. R. 4 Eq., at p. 155; *Harding v. Glyn*, 1739, 1 Atk. 469, 470n.; 26 E. R. 299); by reason of their being accompanied by an explicit direction on the part of the testator or grantor, with regard to the subject-matter and the object or objects of the intended trust (Jarman on *Wills*, 5th ed., vol. i. pp. 356, 366, 367; 2 White and Tudor’s *L. C. Eq.*, 7th ed., pp. 337 *et seq.*; *Cary v. Cary*, 1804, 2 Sch. & Lef., at p. 189; *Briggs v. Penny*, 1851, 3 Mac. & G. 546; 42 E. R. 371; *Bernard v. Minshull*, 1859, John. 276; 70 E. R. 427).

The general rule with regard to the requisites of precatory trusts was stated by Lord Langdale, M.R., in *Knight v. Knight*, 1840, 3 Beav., at pp. 172, 173; 49 E. R. 58; 52 R. R. 74, as follows:—“When property is given, absolutely, to any person, and the same is, by the giver who has power to command, recommended or entreated, or wished to dispose

of that property in favour of another, the recommendation, entreaty, or wish, shall be held to create a trust.—*First*, if the words are so used that, upon the whole, they ought to be construed as imperative; *secondly*, if the subject of the recommendation or wish be certain; and, *thirdly*, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.”

These three requisites must, moreover, co-exist (*Briggs v. Penny*, 1851, 3 Mac. & G. 554; 42 E. R. 371; *Moriarty v. Martin*, 1852, 3 Ir. Ch. R. 26, 31; Lewin on *Trusts*, 9th ed., p. 141; and see *Webb v. Woods*, 1852, 2 Sim. N. S. 267; 61 E. R. 343; *Huskisson v. Bridge*, 1851, 4 De G. & Sm. 24; 64 E. R. 816). With regard to the *first* requisite, suffice it to state that no trust will be created if it appears from the context that the first taker is to have a discretionary power of withdrawing any part of the subject of the gift from the object thereof (*Knight v. Knight*, 1840, 3 Beav. 148; 49 E. R. 58; 52 R. R. 74; see also *Eade v. Eade*, 1820, 5 Madd. 118; 56 E. R. 840; 21 R. R. 384; *Sale v. Moore*, 1827, 1 Sim. 534; 57 E. R. 678; 27 R. R. 239; *In re Hamilton*, [1895] 2 Ch. 370); or if the subject is left “in the entire power” of the donee (*Eaton v. Watts*, 1867, L. R. 4 Eq. 151); or “entirely to his good judgment as he might think best” (*McCormick v. Grogan*, 1869, L. R. 4 H. L. 82; *Sullivan v. Sullivan*, [1903] 1 Ir. R. 193); or to be “at sole and entire disposal” of the donee (*Scott v. Key*, 1865, 35 Beav. 291; 55 E. R. 907; *Hoy v. Master*, 1834, 6 Sim. 568; 58 E. R. 706; 38 R. R. 176); or otherwise at his absolute discretion (see *Lambe v. Eames*, 1871, L. R. 6 Ch. 597; *Stead v. Mellor*, 1877, 5 Ch. D. 225; *M’Alinden v. M’Alinden*, 1877, 11 Ir. R. Eq. 219), [or if the gift is qualified by words such as “unfettered” or “unlimited” (*A.-G. v. Chamberlain*, 1904, 90 L. T. 581)]. With regard to the *second* requisite, any uncertainty as to the amount or nature of the property to be given over, has always been held to negative the idea of a trust (*per curiam* in *Mussoorie Bank v. Raynor*, 1882, 7 App. Cas., at p. 331), as not merely creating a difficulty in regard to the execution of the trust itself, but as having a reflex action upon the precatory words used, and, in the case of a will, of throwing doubt upon the intention of the testator, and indicating that he could not possibly have intended his words of confidence, hope, or whatever they might be, to be imperative words (*ibid.*). With regard to the *third* requisite, it seems that, provided it be not left to the donee of the property to select the object of the gift in any manner he (the donee) may think proper, it suffices if it appears that a trust was intended, though the absolute object of such trust cannot be ascertained (*per Wood, V.-C.*, in *Bernard v. Minshull*, 1859, John. 277). [An illustration of what may be uncertain according to the Scotch view is “charitable” or “public purposes” (*Blair v. Duncan*, [1902] A. C. 39).]

IV. *What Words have been held Sufficient to Raise a Precatory Trust.*—As regards precatory words which have been held to import a trust, it must be borne in mind that the Courts now regard less the actual words used than the whole context of the will or other document in which they are contained, and that none of the older decisions on this subject will be extended in any way (*per Cotton, L.J.*, in *In re Adams and Kensington Vestry*, 1884, 27 Ch. D., at p. 410; *per Lindley, L.J.*, in *In re Hamilton*, *Trench v. Hamilton*, [1895] 2 Ch., at p. 373; *per Lindley, L.J.*, in *In re Williams*, *Williams v. Williams*, [1897] 2 Ch., at p. 18; *per curiam* in *Mussoorie Bank v. Raynor*, 1882, 7 App. Cas., at p. 330), it being now considered that, by the aid of the equitable doctrine of precatory trusts,

the intentions of testators have too frequently been defeated (*per* Lopes, L.J., in *Hill v. Hill*, [1897] 1 Q. B., at 488; and see *per* James, V.-C., in *Lambe v. Eames*, 1871, L. R. 6 Ch. 597, 599). Subject to these cautionary observations, the following list of precatory words, which have been held to be *imperative*, and to raise a trust, may not be without value :—

“ Authorise and empower ” (*Brown v. Higgs*, 1799, 4 Ves. 708; 5 Ves. 495; affirmed, 8 Ves. 561; 4 R. R. 323); “ have full assurance and confident hope ” (*Macnab v. Whitbread*, 1853, 17 Beav. 299); “ feeling assured and having every confidence ” (*Gully v. Cragoe*, 1857, 24 Beav. 185); “ be well assured ” (*Macey v. Shurmer*, 1739, 1 Atk. 389); “ trusted that ” (*Pilkington v. Boughiey*, 1841, 12 Sim. 114); “ trusting ” (*Irvine v. Sullivan*, 1869, L. R. 8 Eq. 673); “ trust and confide ” (*Wood v. Cox*, 1836, 1 Keen, 317); “ confiding ” (*Griffiths v. Evans*, 1842, 5 Beav. 241; and see *Shepherd v. Nottidge*, 1862, 2 John. & H. 766); “ have the fullest confidence ” (*Shovelton v. Shovelton*, 1863, 32 Beav. 143; *Wright v. Atkyns*, 1810, 17 Ves. 255; 19 Ves. 299; *Palmer v. Simmonds*, 1854, 2 Drew. 221; *Curnick v. Tucker*, 1874, L. R. 17 Eq. 320; *Le Marchant v. Le Marchant*, 1874, L. R. 18 Eq. 414; *In re Hutchinson and Tenant*, 1878, 8 Ch. D. 540, 543; *Eaton v. Watts*, 1867, L. R. 4 Eq., at p. 155; *Smith v. Gibson*, 1871, 20 W. R. 88); [“ in full confidence ” is in itself a neutral expression, it depends upon the context whether a trust is created (Lord Davey in *Comiskey v. Bowring-Hanbury*, [1905] A. C. 89)]; “ in the firm conviction ” (*Barnes v. Grant*, 1856, 26 L. J. Ch. 92); “ in the full belief ” (*Fordham v. Speight*, 1875, 23 W. R. 782); “ convinced ” (*Hart v. Tribe*, 1854, 18 Beav. 215); “ well knowing ” (*Bardswell v. Bardswell*, 1838, 9 Sim. 319, 323; *Nowlan v. Nelligan*, 1785, 1 Bro. C. C. 489; *Briggs v. Penny*, 1851, 3 Mac. & G. 546; but see *Stead v. Mellor*, 1877, 5 Ch. D. 225; *Greene v. Greene*, 1869, Ir. R. 3 Eq. 90, 629); “ of course he will give ” (*Robinson v. Smith*, 1821, 6 Madd. 194); “ apply the same at his discretion ” (*Wainford v. Heyl*, 1875, L. R. 20 Eq. 321); “ not doubting ” (*Parsons v. Baker*, 1812, 18 Ves. 476; 11 R. R. 237; *Ray v. Adams*, 1834, 3 Myl. & K. 237); “ desire ” (*Harding v. Glyn*, 1739, 1 Atk. 469); [“ desire ” may or may not be imperative (*Re Oldfield*, [1904] 1 Ch. 549)]; “ will and desire ” (*Birch v. Wade*, 1814, 3 Ves. & Bea. 198; 13 R. R. 181; *Forbes v. Ball*, 1817, 3 Mer. 437; *Eales v. England*, 1704, 2 Vern. 466); “ wish and desire ” (*Liddard v. Liddard*, 1866, 28 Beav. 266); “ wish and request ” (*Foley v. Parry*, 1832, 5 Sim. 138; S. C., 2 Myl. & K. 138); “ will ” (*Clowdsley v. Pelham*, 1866, 1 Vern. 411); “ will and declare ” (*Gray v. Gray*, 1860, 11 Ir. Ch. 218); “ order and direct ” (*Cary v. Cary*, 1804, 2 Sch. & Lef. 189; *White v. Briggs*, 1847, 2 Ph. Ch. 583; *Wilson v. Bell*, 1869, L. R. 4 Ch. 581; but see *Barrs v. Fewks*, 1865, 34 L. J. Ch. 522); “ it is my dying request ” (*Pierson v. Garnet*, 1787, 2 Bro. C. C. 226); “ requesting ” (*Eade v. Eade*, 1820, 5 Madd. 118; 21 R. R. 384; *Bernard v. Minshull*, 1859, John. 276; but see *House v. House*, 1874, 31 L. T. N. S. 427); “ entreat ” (*Prevost v. Clarke*, 1816, 2 Madd. 458); “ require and entreat ” (*Taylor v. George*, 1814, 2 Ves. & Bea. 378); “ beg ” (*Corbet v. Corbet*, 1873, Ir. R. 7 Eq. 456); “ most heartily beseech ” (*Meredith v. Heneage*, 1824, 1 Sim. 542, 553; 27 R. R. 243); “ advise ” (*Parker v. Bolton*, 1835, 5 L. J. Ch. 98); “ recommend ” (*Malin v. Keighley*, 1794, 2 Ves. 333; *Tibbits v. Tibbits*, 1816, 19 Ves. 656; 23 R. R. 79; *Paul v. Compton*, 1803, 8 Ves. 380; 7 R. R. 81; *Cholmondelay v. Cholmondelay*, 1845, 14 Sim. 590; *Hart v. Tribe*, 1854, 18 Beav. 215). For other words which have been held to import a trust, as being in their nature *imperative*, see Lewin on *Trusts*, 9th ed., p. 137; 11th ed., p. 144; Godefroi on *Trusts*, pp. 145 *et seq.*; 3rd ed., pp. 165 *et seq.*; Jarman on *Wills*, 5th ed., vol. i. pp. 357 *et seq.*; 2 White and Tudor’s *L. C. Eq.*, pp. 339 *et seq.*; Theobald on *Wills*, 4th ed., pp. 398 *et seq.*; 7th ed., p. 488; 1 Atk. p. 470*n.* (1), and cases there cited. In this connection, it may be stated that all precatory words of the same character are not considered as of equal force (*per* Stuart, V.-C., in *Eaton v. Watts*, 1867, L. R. 4 Eq., at p. 155). Thus

"confidence," which was the old name for trust, was considered stronger than words of recommendation, or request, or of hope (*ibid.*). Indeed, as regards words of request, in their ordinary meaning, they convey a mere request, and not a legal obligation of any kind, either at law or in equity (*per* Lopes, L.J., in *Hill v. Hill*, [1897] 1 Q. B., at p. 486). On the other hand, a request is often a polite form of command, and not only in wills, but in daily life, an expression may be imperative in its real meaning, although couched in language which is not imperative in form (*per* Lindley, L.J., in *In re Williams, Williams v. Williams*, [1897] 2 Ch., at p. 19). Where the distinction between words is small, something will generally be found in the context to indicate the intention of the donor (*Eaton v. Watts, ubi supra*). Thus a trust has often been implied from powers of selection and distribution contained in wills (Jarman on *Wills*, 5th ed., vol. i. p. 517; 2 White and Tudor's *L. C. Eq.*, 7th ed., pp. 354 *et seq.*, and cases there cited). The leading case as to precatory trusts of *Harding v. Glyn*, 1739, 1 Atk. 469, is an example of this method of construction (see *per* Lord Eldon, C., in *Brown v. Higgs*, 1803, 8 Ves., at p. 570; 4 R. R. 323; and see also *Burrough v. Philcox*; *Lacey v. Philcox*, 1840, 5 Myl. & Cr. 73, 92).

V. *The Modern Doctrine as to Precatory Trusts.*—There is an admitted conflict between modern authorities as to precatory trusts and the older authorities (see Sugden on the *Law of Property*, pp. 375 *et seq.*), and the tide is believed to have now completely set against raising a trust from precatory words alone, apart from their context. On this subject Lindley, L.J., thus expresses himself in *In re Williams, Williams v. Williams*, [1897] 2 Ch., at p. 18:—"There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is, and in whose favour it is to be performed. There is also abundant authority for saying that if property is left to a person in confidence, that he will dispose of it in a particular way, as to which there is no ambiguity; such words are amply sufficient to impose an obligation. . . . But still, in each case the whole will must be looked at; and, unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases, obligations were inferred from language which in modern times would be thought insufficient to justify such an inference."

The following cases quite bear out this statement of the modern doctrine as to precatory trusts, and show that the old decisions must, at all events, not be extended:—See *per* Cotton, L.J., in *In re Adams and Kensington Vestry*, 1884, 27 Ch. D., at p. 410; *per* Lindley, L.J., in *In re Hamilton, Trench v. Hamilton*, [1895] 2 Ch., at p. 373; *per curiam* in *Hill v. Hill*, [1897] 1 Q. B., pp. 488, 493, 494 (C. A.); *In re Diggles*, 1888, 39 Ch. D. 253; *Lambe v. Eames*, 1871, L. R. 6 Ch. 597; *Stead v. Mellor*, 1877, 5 Ch. D. 225; *In re Hutchinson and Tenant*, 1878, 8 Ch. D. 540; *In re Moore, Moore v. Roche*, 1886, 34 W. R. 343; *Mussoorie Bank v. Raynor*, 1882, 7 App. Cas. 321, 330; *Mackett v. Mackett*, 1872, L. R. 14 Eq. 49; *In re Bond, Cole v. Hawes*, 1876, 4 Ch. D. 238; *Parnall v. Parnall*, 1878, 9 Ch. D. 96; *Eaton v. Watts*, 1867, L. R. 4 Eq. 151; *M'Alinden v. M'Alinden*, 1877, 11 Ir. R. Eq. 219; *In re Elliott, Kelly v. Elliott*, [1896] 2 Ch. 353; *In re Oldfield*, [1904] 1 Ch. 549. Though, however, modern decisions have somewhat modified the old authorities as to precatory trusts, the old doctrine itself has by no means been abolished (*per* Lindley, L.J., in *In re Williams, Williams v. Williams*, [1897] 2 Ch., at p. 18), and,

as regards the requisites of a precatory trust, the old cases already cited on this subject retain their binding force (see *Hill v. Hill*, [1897] 1 Q. B. 483, 493; 2 White and Tudor's *L. C. Eq.*, 7th ed., pp. 343 *et seq.*; Godefroi's *Trusts and Trustees*, 2nd ed., pp. 148 *et seq.*; Theobald on *Wills*, 4th ed., pp. 399 *et seq.*; 7th ed., pp. 486 *et seq.*).

VI. *Interest taken by the Donee of a Precatory Gift.*—There is a distinction between a gift *subject to trusts* and a gift *upon trusts*. In the former case the donee takes whatever is not required for the performance of those trusts (*ibid.*; and see *Clarke v. Hilton*, 1866, L. R. 2 Eq. 810; *Irvine v. Sullivan*, 1869, L. R. 8 Eq. 673; *Fenton v. Hawkins*, 1861, 9 W. R. 301; *Croome v. Croome*, 1888, 59 L. T. 582; *King v. Denison*, 1813, 1 Ves. & Bea. 260; 12 R. R. 227), while in the latter the donee takes the whole upon trust for the purposes declared, or, failing them, for the heir-at-law or next-of-kin of the donor [see *Re West*, [1900] 1 Ch. 84; *Morrison v. M'Ferran*, [1901] 1 Ir. 360]. The cases on this subject are numerous, and frequently of difficulty, and the tendency of the Courts, in recent years, is not to decide the question on the consideration of any particular form of words, but to endeavour to gather the intention of the donor from the scope of the instrument; each case being thus made to rest upon its own particular circumstances and forms of expression used (2 White and Tudor's *L. C. Eq.*, 7th ed., p. 350; *Croome v. Croome*, 1888, 59 L. T. 582; 61 L. T. 814). For further information on this head, see Theobald on *Wills*, 4th ed., pp. 401 *et seq.*; 7th ed., pp. 487 *et seq.*; 2 White and Tudor's *L. C. Eq.*, 7th ed., pp. 350 *et seq.*; Godefroi on *Trusts*, 2nd ed., pp. 149 *et seq.*; 3rd ed., pp. 105 *et seq.*

VII. *How a Precatory Trust must be Executed.*—Any rule laid down in an instrument creating a precatory trust, as to its mode of execution, must be observed by the trustee, and the Court will itself execute the trust, if necessary (see *Gower v. Mainwaring*, 1750, 2 Ves. 87; 28 E. R. 57; *Salisbury v. Denton*, 1857, 3 Kay & J. 529; 69 E. R. 1219). It is a universal proposition that a trustee ought strictly to pursue the tenor of his trust, without perverting it, directly or indirectly, to his own personal advantage; and when he fails in performing his duty, it is the office of a Court of Equity to interpose and guide him, and decree what shall be done (*Richardson v. Chapman*, 1760, 7 Bro. P. C. 318; 3 E. R. 206). Where absolute discretion has been given to trustees as to the exercise of a power, the Court will not compel them to exercise it, but, if they propose to exercise it, the Court will see that they do not exercise it improperly and unreasonably (*Tempest v. Lord Camoys*, 1882, 21 Ch. D. 571 (C. A.)). Where, however, the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ-fide* exercise of it (*Tempest v. Lord Camoys*, *supra*). The Court will likewise control trustees if they exercise their powers in an arbitrary and unreasonable manner (2 White and Tudor's *L. C. Eq.*, 7th ed., p. 365; *In re Hodges*, *Davey v. Ward*, 1878, 7 Ch. D. 754). Where a power, in the nature of a trust, gives the trustees liberty to distribute a fund *unequally*, they may do so, but if the Court interpose, on default by the trustees, it will divide the fund among the objects *equally* (2 White and Tudor's *L. C. Eq.*, 7th ed., p. 362). If, however, such power authorise only an equal distribution, this will be equivalent to a gift to the objects, because the trustees can only exercise the power in the same manner as the Court would do (*ibid.*; and see *Phillips v. Garth*, 1790, 3 Bro. C. C. 64; 29 E. R. 410; *Rayner v.*

Mowbray, 1791, 3 Bro. C. C. 234; 29 E. R. 508). Where a precatory trust has been created in favour of a class, the trustee may, in executing the trust limit the share of a female member of the class to her separate use (*Willis v. Kyner*, 1877, 7 Ch. D. 181).

[*Authorities.*—All the principal authorities are cited in the text.]

Precedence, Patent of.—Letters patent of precedence are grants whereby the ordinary precedence of an individual, which he takes by virtue of his social or professional rank, is set aside, and he is assigned some higher position. The most important interference with the scale of precedence in the various professions which the Crown has exercised, is in regard to the precedence of the various classes of advocates practising in the Courts of justice; this right being closely connected with the right of pre-audience upon many occasions. In the legal profession precedence was determined by the regulations and usages of the Courts; and Sir Edward Coke (*Inst.*, iv. p. 71), speaking of the King's Bench, says that the proceedings there under so many honourable judges and sages of the law hath gotten such a foundation as cannot now without an Act of Parliament be shaken. And in *The Serjeants' Case* (Man. Rep. 25) the question is raised, "Whether the judges would be bound to obey an order from the Crown to hear one counsel before another?" And the answer is: "The Crown may exercise a prerogative that is consistent with the usage of the Court."

The King's Counsel, down to Lord Bacon's time, who had recognised precedence and pre-audience over all others, were the King's Serjeants and the Attorney- and Solicitor-General. King's Counsel extraordinary were afterwards somewhat rarely appointed until the reign of George III., when their creation became more common. This class of advocates, now known as King's or Queen's Counsel (*q.v.*), were appointed by patent, and precedence was given them thereby over the Serjeants-at-Law (*q.v.*). After the serjeants lost their monopoly in the Court of Common Pleas, it was customary to grant patents of precedence to those of them whose professional reputation warranted it; so that they obtained rank and precedence immediately after the counsel of the Crown already created, and before those of subsequent creation. These patents were also granted to barristers upon whom it was desired to confer a mark of distinction, without subjecting them to the disabilities under which counsel to the Crown were subject as holding office under the Crown. Mostly they were conferred upon barristers who were members of the House of Commons, whose seats would have been vacated if they had been appointed counsel to the Crown. This was the motive in such distinguished cases as those of Mansfield, Erskine, Eldon, and Brougham.

Serjeant Pulling in *The Order of the Coif*, p. 200, thinks these patents of doubtful legality, as being against the established usage of the Courts; but adds that they have never really been called in question.

Holders of the patents sat within the bar with the counsel of the Crown.

It has now become very unusual to grant them. Mr. Justice Phillimore was the only holder of such a patent at the bar on his appointment to the bench in 1897, with the exception of Serjeant Simon, who died in that year, and was the last of the serjeants to hold a patent of precedence.

[*Authority.*—Pulling, *Order of the Coif*.]

Precedence; Precedency.—Precedence, or the rank which subjects bear in the State in regard to each other, was determined at common law by virtue of the Sovereign's prerogative. The various ranks of the Peerage (*q.v.*) had been so created, and newer creations made of higher rank than the older ones. The discontent aroused thereby, and by grants of patents of precedence amongst persons of the same rank, led to the subject being dealt with by statute in 1539. This statute (31 Hen. VIII. c. 10) was the first which dealt with the subject of precedence; and it contains the recital that it appertained to the King's prerogative royal to give such honour, reputation, and placing to his counsellors and subjects as might please him. The Act is called an Act for the placing of the Lords in the Parliament. It deals with the seats of the great officers of State in the House of Lords, and otherwise only provides that the other Lords should sit and be placed according as they had been accustomed. But orders of precedence had long before established a scale for both the nobles and the gentry of England. The first was in 1339, and the last in the time of Henry VII., which is mentioned in the *Institutes* (pt. iv. p. 363) as having fixed the places of "both the sons, wives, and daughters of Lords of Parliament, as dukes, marquises, earls, viscounts, and barons, and of bannerets, knights, esquires, and gentlemen, and of their wives and children."

This statute and the above regulations have governed the subject of precedence ever since; but they have been altered and extended from time to time by numerous other statutes, warrants, and ordinances.

The creation of [Lords of Appeal in Ordinary and of] the order of baronets (*q.v.*), and that of various orders of knighthood, to which various degrees of precedence have been given, have been the chief elements in the alteration of the old scale of general or social precedence.

In the *Institutes* (*supra*), it is said that the question of the precedency of any Lord of Parliament is decided by the House of Lords, as privileges concerning the House of Commons are to be decided by that House; and that the determination of the places and precedences of others doth belong to the COURT OF CHIVALRY (*q.v.*), "unless any question ariseth upon the said Act of Parliament of 31 Hen. VIII., for that being part of the law of the realm (as all other statutes be), is to be decided by judges of the common law."

The judges, however, do not appear ever to have been occupied with such cases.

It is upon the occasions of State functions, such as the coronation of the Sovereign, and of Court ceremonies, that the due ordering of various classes of subjects becomes of importance, and the State officers intrusted with them, and the HERALDS (*q.v.*) are the authorities whose judgments are sought.

The scale of general or social precedence, irrespective of academic or professional distinctions, which depend on other principles than the general scale, is well determined. It may be said, however, that the scale, set out in all the editions of Blackstone's *Commentaries*, is imperfect and unreliable (see the 1844 ed. of Hargrave, vol. i. p. 405*n.*). They confuse together the general scale and the professional scale, and they take no account of the changes that have been made by legislation and patents in the present reign, nor of the creation of the modern orders of knighthood.

The above-mentioned Statute of Henry VIII. forms the solid foundation of the scale of precedence. It settles the precedence of the princes of the blood, of the archbishops, of the Lord Chancellor, and the other great officers of State and the royal household, and of the peerage. Interposed between these classes are certain ranks which are determined by a well-ascertained usage, *e.g.* that of eldest sons of dukes of the blood royal, whose places are not ascertained in the Act, but from an ancient table of precedence in the College of Arms, according to which they were assigned that place in 1399.

In the same way, the position of dukes' eldest sons has been fixed from the same date (Dod, *Peerage*, etc.).

In consequence of the successive unions of the kingdoms of Scotland and Ireland with England, their precedence had to be determined. By the 5 & 6 Anne, c. 8 (6 Anne, c. 11, in the Revised Statutes), confirming the Articles of Union, Article xxiii. was confirmed, which provided that all peers of Scotland and the successors to their honours and dignities should have rank and precedence next, and immediately after the peers of the like orders and degrees in England at the time of the Union, and before all peers of Great Britain of the like orders and degrees which should be created after the Union.

The Act of Union between Great Britain and Ireland in 1800 (39 & 40 Geo. III. c. 67) provided that all lords spiritual of Ireland should have rank and precedence next and immediately after the lords spiritual of the same rank and degree of Great Britain; and that the persons holding any temporal peerages of Ireland existing at the time of the Union should, from and after the Union, have rank and precedence next and immediately after all the persons holding peerages of the like orders and degrees in Great Britain subsisting at the time of the Union; that all peerages of Ireland created after the Union should have rank and precedence with the peerages of the United Kingdom so created according to the dates of their creations.

One or two points in the scale may be mentioned which the Act as thus modified determines. The Archbishop of Canterbury is the first in rank after the family of the Sovereign; the Lord Chancellor (if he is a peer) the second; the Archbishop of York the third; [and the Prime Minister (by the warrant of 1905) the fourth]. The Bishops of London, of Durham, and of Winchester rank in the order named, and all the other bishops [after the viscounts and] before the barons.

By the Act 1 Will. & Mary, c. 21, s. 1, for enabling the Commissioners of the Great Seal to execute the office of Lord Chancellor, it is declared that the Commissioners shall have and take place next after the Peers and Speaker of the House of Commons, unless any of them shall happen to be a peer, and then according to his peerage. These words confirm the place of the Speaker of the House of Commons, which, in fact, depends on ancient usage.

Knights of the Garter, Privy Councillors, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, the Chief-Justices and Chief Baron of the Exchequer (now the Lord Chief-Justice), the Master of the Rolls, and the other judges of the degree of the Coif, as well as the younger sons of viscounts, were assigned their precedence by an Ordinance of the tenth year of the reign of James I. (1612).

The Lords Justices of Appeal take their precedence under the Court of Appeal in Chancery Act, 1851, 14 & 15 Vict. c. 83, s. 3, confirmed to

the Lords Justices of the Court of Appeal created by the Judicature Acts, 1873 and 1875; and also the judges of the High Court, now, under the latter Acts.

Baronets were given their precedence on the creation of the order in the ninth year of James I., and in the tenth year of the same reign the above-mentioned Ordinance determined the question of precedence which arose between the younger sons of viscounts and barons and the new order.

The knights and companions of the various orders are assigned their precedence by their respective statutes.

Judges of County Courts have their precedence under a Royal Warrant of the 4th August 1834.

The ground of the precedence of the other ranks will be noted in the scale itself as given below.

As to the rank and precedence of a peeress in her own right, see *PEERAGE*; otherwise the rank of wives depends on that of their husbands, [unless being daughters of peers they marry a commoner, in which case, they retain their birth rank]. In the case of the great officers of State and others of official rank, *e.g.* the archbishops and bishops, wives have no consequent precedence, [the position of the husband being due to office alone]; nor do their children take rank as do the children of the temporal peerage. [Until recently the children of the Lords of Appeal in Ordinary, who are Lords of Parliament for life, had no established precedence, but the Crown recently granted them the right to the prefix of Honourable, and gave them place next after the younger children of barons. The wives of Lords of Appeal in Ordinary are termed by courtesy "Lady," and have precedence among women next after baronesses.] See, as to the precedence of women, the *Peerages of Burke and Dod*.

[The prerogative of the Crown is frequently exercised to give special precedence to children of deceased persons who were in the direct line of succession to an hereditary dignity, *e.g.* the younger children of a peer's deceased eldest son will, when their eldest brother succeeds to the title, invariably be given the rank and precedence they would have attained had their father lived. Widows also are occasionally given special precedence, *e.g.* in the case of a person upon whose husband the Crown had intended to confer a knighthood, but who died before the ceremony.]

In addition to the general precedence, there are various other distinctions which are considered of importance. Chief amongst these is diplomatic precedence, which is based upon agreements of the Powers at the Congresses of Vienna in 1815, and of Aix-la-Chapelle in 1818. Ambassadors yield precedence only to the members of the Royal Family at the Courts they are accredited to, and to the sons and brothers of sovereigns; but other diplomatic personages cannot claim this precedence, and in England they are placed after dukes and before marquises.

There is the precedence at the Castle of Dublin, at the Court of the Lord High Commissioner to the General Assembly of the Church of Scotland, at the Viceroy's Court in India, at the Governor-General's in Canada, Australia, and New Zealand, which is based upon official positions held by men in India, Canada, Australia, and New Zealand. The precedence and position of persons in other colonies depends upon their official standing.

[In counties the Lord-Lieutenant stands first, and second the High Sheriff. In corporate towns the Lord Mayor or Mayor comes first, and after him the aldermen, sheriff, chief officers, and livery. At Oxford and Cambridge the Vice-Chancellor gives place to the High Sheriff. In the modern Universities the Vice-Chancellor has no precedence as such outside his University.]

SCALE OF PRECEDENCE.

Sovereign.

Prince of Wales.

Sovereign's younger sons.

„ grandsons.

„ brothers.

„ uncles.

„ nephews.

Archbishop of Canterbury.

Lord Chancellor (if a peer).

Archbishop of York.

[Prime Minister (warrant of 1905).]

[Lord Chancellor of Ireland]

Lord High Treasurer (not in use)

Lord President of the Privy Council } If peers.

Lord Privy Seal

Lord Great Chamberlain

Lord High Constable (not in use)

Earl Marshal

Lord High Admiral (not in use)

Lord Steward of the Household

Lord Chamberlain of the Household } Above all peers of their own degree.

Dukes of England.

„ Scotland.

„ Great Britain.

„ Ireland.

„ United Kingdom, and Dukes of Ireland created since the Union.

Eldest sons of Dukes of the Blood Royal.

Marquises of England.

„ Scotland.

„ Great Britain.

„ Ireland.

„ United Kingdom, and Marquises of Ireland created since the Union.

Dukes' eldest sons.

Earls of England.

„ Scotland.

„ Great Britain.

„ Ireland.

„ United Kingdom, and Earls of Ireland created since the Union.

Younger sons of Dukes of the Blood Royal (ancient usage).

[Marquises' elder sons.]

[Dukes' younger sons.]

Viscounts of England.

„ Scotland.

„ Great Britain.

„ Ireland.

„ United Kingdom, and Viscounts of Ireland created since the Union.

Earls' eldest sons (usage from fourteenth century).

Marquises' younger sons (usage from fourteenth century).

Bishop of London.

" Durham.

" Winchester.

English bishops (according to seniority of consecration to any see).

Moderator of the General Assembly of the Church of Scotland (granted by His Majesty).

Secretary of State, and Chief Secretary to the Lord-Lieutenant of Ireland, if a baron; if of higher degree, he does not have the precedence over those of his own rank (Coke, *Inst.*, p. 361).

Barons of England.

" Scotland.

" Great Britain.

" Ireland.

" United Kingdom, and Barons of Ireland created since the Union.

[Lords of Appeal in Ordinary.]

Speaker of the House of Commons.

Commissioners of the Great Seal.

Treasurer of the Household (warrant of 1540).

Comptroller of the Household (warrant of about the same time).

Vice-Chamberlain of the Household (warrant of Henry VIII.).

Secretary of State, and Chief Secretary to the Lord-Lieutenant of Ireland (if under the degree of baron).

Viscounts' eldest sons (Order of the Constable of England in 1467).

Earls' younger sons (by the same Order).

Barons' eldest sons (usage).

Knights of the Garter (K.G.).

Privy Councillors.

Chancellor of the Exchequer.

Chancellor of the Duchy of Lancaster.

The Lord Chief-Justice of England (if a peer, peer's rank).

Master of the Rolls (if a peer, peer's rank).

The Lords Justices.

[President of the Probate, Admiralty, and Divorce Divisions.]

Judges of the High Court.

Bannerets (knights created under the royal banner in open war, the Sovereign or the Prince of Wales being present—by custom).

Viscounts' younger sons.

[Barons' younger sons.]

[Sons of Lords of Appeal in Ordinary.]

Baronets.

Bannerets not made by the Sovereign in person (usage).

Knights Grand Cross of the Bath (G.C.B.).

" " Commanders of the Star of India (G.C.S.I.).

" " Cross of St. Michael and St. George (G.C.M.G.).

" " Commanders of the Order of the Indian Empire (G.C.I.E.).

" " [Cross of the Royal Victorian Order.] (G.C.V.O.).

Knights Commanders of the Bath (K.C.B.).

" " of the Star of India (K.C.S.I.).

" " of St. Michael and St. George (K.C.M.G.).

" " of the Order of the Indian Empire (K.C.I.E.).

" " [of the Royal Victorian Order] (K.C.V.O.).

Knights Bachelors (by many Acts and Ordinances, which have assigned other classes precedence over them).

[Commanders of the Royal Victorian Order] (C.V.O.).

Judges of County Courts.

[Masters in Lunacy.]

Companions of the Bath (C.B.).

„ of the Star of India (C.S.I.).

„ of St. Michael and St. George (C.M.G.).

„ of the Order of the Indian Empire (C.I.E.).

[Members (4th Class) of the Royal Victorian Order] (M.V.O.).

Companions of the Distinguished Service Order (D.S.O.).

Eldest sons of the younger sons of Peers (an Ordinance of Earl Marshal's Court, 1615).

Eldest sons of Baronets (the same).

Eldest sons of Knights of the Garter (usage).

Eldest sons of the various classes of knights, according to their father's precedence.

[Members (5th Class) of the Royal Victorian Order] (M.V.O.).

[Members of the Imperial Service Order] (I.S.O.).

[Younger sons of younger sons of Peers.]

Baronets' younger sons.

[Esquires of the Sovereign's body.]

[Gentlemen of the Privy Chamber.]

Esquires—(1) Creation, (2) Office (*q.v.*).

[Younger sons of Knights.]

Gentlemen (*q.v.*).

See COURT OF CHIVALRY; EARL MARSHAL; PEERAGE; SOVEREIGN.

[References.—The Peerages of Burke, Dod, or Lodge. See also G. E. C.'s *Complete Peerage*.]

Precedent Conditions.—See CONDITIONS.

Precedents.—1. The principle upon which an actually decided case in the High Court or the Court of Appeal or the House of Lords has been decided, constitutes a rule of law to be followed in subsequent cases by Courts of co-ordinate jurisdiction with (below, 2), or of inferior jurisdiction to, the Court which decided the case (*In re Hallett's Estate*, 1879, 13 Ch. D., at p. 712). The binding authority of precedents is characteristic of English law. It can be traced in the common law as far back as the fourteenth century (Pollock's *First Book of Jurisprudence*, chap. vi.). In equity, also, great deference was paid to precedents from the earliest times to which the records can be traced (3 Blackstone, p. 432; Kerly, *History of Equity*, pp. 100, 188), and during the present century they have been as binding in equity as at law.

2. As regards a Court of co-ordinate jurisdiction, the rule that the decision of another Court must be followed has been said to be a rule of comity only (Brett, L.J., *The Vera Cruz*, 1884, 9 P. D., at p. 98), and that a judge may dissent if he thinks the principle of the earlier case wrong (Jessel, M.R., in *Osborne v. Rowlett*, 1880, 13 Ch. D., at p. 785; and *Gathercole v. Smith*, 1881, 44 L. T., at p. 441). But the rule above stated is generally put as an absolute one (*Palmer v. Johnson*, 1884, 13 Q. B. D., at p. 355; *Cason v. Churchley*, 1883, 53 L. J. Q. B., at p. 336). The practice is to very rarely depart from a decision of a co-ordinate Court which is cited and is in point. Cases are very frequently, however, practically departed from by refined or unreal distinctions (see the elaborate collections in such works as Woods and Ritchie's *Digest of Cases Overruled, not Followed*, etc.). As an example, cp. *Sheffield v. London Joint-Stock Bank*, 1888, 13 App. Cas. 333, and *Simmons v. London Joint-Stock Bank*, [1892] App. Cas. 201.

3. Where a case is "contrary to the current of earlier authority" it need not be followed (*In re Klæbe*, 1884, 28 Ch. D., at p. 180; Blackstone, *ubi supra*). Where there are conflicting decisions of judges or Courts of co-ordinate jurisdiction, the judge or Court must take their choice. In the House of Lords the more recent of its decisions ought to be followed (*Campbell v. Campbell*, 1880, 5 App. Cas., at p. 798).

4. If on an appeal the judges are equally divided, a co-ordinate Court is not bound by the decision of the case (*The Vera Cruz*, 1884, 9 P. D. 96). [But according to Lord Campbell, L.C., where the Lords are evenly divided the decision is binding even on the House of Lords (*A.-G. v. Dean of Winchester*, 1860, 8 H. L. C. 369, 392; 11 E. R. 472; *Beamish v. Beamish*, 1861, 9 H. L. C. 274, 338; 11 E. R. 735; see note to *Paquin v. Beauclerk*, [1906] A. C. 149).]

5. The Court of Appeal is not bound by the decision of a Court of first instance, nor the House of Lords by a decision of the Court of Appeal; but if a decision (or dictum, *In re Rosher*, 1884, 26 Ch. D. 821—a note in an old text-book) of the subordinate Court has laid down a rule which has long been acted upon, the superior Court will generally follow it, even if the rule be disapproved of (*Pugh v. Golden Valley Rly. Co.*, 1880, 15 Ch. D. 330; *Smith v. Keal*, 1882, 9 Q. B. D., at p. 352; *Bain v. Fothergill*, 1874, L. R. 7 H. L., at p. 209). This practice especially applies where the rule adopted is one of conveyancing (*In re Lashmar*, [1891] 1 Ch., at p. 268, Bowen, L.J.); where contracts are likely to have been made on the footing of it (*Ex parte Lickorish*, 1890, 25 Q. B. D. 176); and where it affects the interpretation of mercantile documents (*Palmer v. Johnson*, 1884, 13 Q. B. D., at p. 355; *Pandorf v. Hamilton*, 1886, 17 Q. B. D., at p. 674). It applies to a rule of procedure (*Fraser v. Ehrensperger*, 1883, 12 Q. B. D., at p. 318), but not to a decision as to the jurisdiction of an inferior Court (*R. v. Edwards*, 1884, 13 Q. B. D., at p. 590). It has no application if the decision in point has frequently been questioned (*Pearson v. Pearson*, 1884, 27 Ch. D. 145, itself disapproved in *Trego v. Hunt*, [1896] App. Cas. 7).

6. It is now determined that when the House of Lords has given a deliberate decision upon a question of law, it will not in any subsequent case treat the correctness of such decision as open to argument (*London Street Tram. Co. v. L. C. C.*, [1898] A. C. 375; *per* Lord Blackburn, *Houldsworth v. City of Glasgow Bank*, 1880, 5 App. Cas., at p. 335; and *Beamish v. Beamish*, 1861, 9 H. L. 274). [See also *per* Lord Wensleydale in *Mersey Docks Trustees v. Gibbs*, 1866, L. R. 1 H. L. 93, at p. 125 and *cp. Paquin v. Beauclerk*, [1906] A. C. p. 149, note for cases where the Lords are evenly divided.] The Judicial Committee of the Privy Council does not hold itself so completely bound by its former decisions (*Read v. Bishop of Lincoln*, [1892] App. Cas. 644); and see CONCURRENT FINDINGS.

7. The Court of Appeal holds itself bound by its own decisions, and by those of the old Lords Justices and Court of Exchequer Chamber (*Pledge v. Carr*, [1895] 1 Ch., at p. 52; *Lavy v. L. C. C.*, [1895] 2 Q. B., at p. 581), but not absolutely by the decisions of the Lord Chancellor sitting alone (Thesiger, L.J., in *Wheeldon v. Burrows*, 1879, 12 Ch. D., at p. 54; *cp. In re Watts*, 1885, 29 Ch. D., at 953). The full Court of Appeal may overrule decisions of a lesser number of its members (*Kelly v. Kellond*, 1888, 20 Q. B. D., at p. 572).

8. Nisi Prius rulings are not treated as absolutely binding even on judges of first instance (*Parton v. Williams*, 1820, 3 Barn. & Ald., at p. 341; 22 R. R., at p. 422).

9. The opinions of the Judicial Committee of the Privy Council are treated with great respect by the High Court and Court of Appeal, but not as of binding authority (*Leask v. Scott*, 1877, 2 Q. B. D., at pp. 376, 380; [*Dulieu v. White*, [1901] 2 Q. B. pp. 677, 683]). In Admiralty and mercantile cases, on points of law common to England and the colonies, especial weight is given to them (*City of Chester*, 1884, 9 P. D., at p. 207).

10. The decisions of Scotch or Irish Courts are similarly treated as entitled to respect (*R. v. Income Tax Commissioners*, 1888, 22 Q. B. D., at p. 313; *In re Parsons*, 1890, 45 Ch. D., at p. 63; [*Tozerland v. West Ham Union*, [1907] 1 K. B. 920]), but they are not invariably followed (*l.c.*; *Morgan v. London and General Omnibus Co.*, 1883, 12 Q. B. D. 201). American cases may be cited as showing the opinions of learned persons (*Lord Watson, Castro v. R.*, 1881, 6 App. Cas., at p. 249); and see AMERICAN LAW.

11. The authority of precedents upon the construction of documents (not being documents in a common form, see above, 5) is often denied (*In re New Callao Co.*, 1882, 22 Ch. D. 488; *Hack v. London Provident Building Society*, 1883, 23 Ch. D. 111, Jessel, M.R.). As to the construction of will, see WILL, and the preface to Theobald on *Wills*. Where the law has been codified by an Act of Parliament, old precedents can only be referred to where the construction of the code itself is doubtful (*Robinson v. Canadian Pacific Rly. Co.*, [1892] App. Cas. 481). [Where a word in an Act of Parliament has been defined by a later Act, and the later Act is repealed, the definition remains good and binding (*Parker v. Talbot*, [1905] 2 Ch. 643).]

12. A decision affirmed by the Court of Appeal on "other grounds" is practically overruled (*Hack v. London Provident Building Society*, 1883, 23 Ch. D. 111).

[*Authorities*.—Sir Frederick Pollock, *op. cit.*; Fisher's *Digest*, title "Decided Cases."]

Preceding Twelve Months.—See Valuation (Metropolis) Act, 1869, s. 46; *R. v. Poplar Union Assessment Committee*, 1884, 13 Q. B. D. 364.

Preces primariæ, or primæ.—An imperial right of presentation to the first prebend that fell vacant in every church of the Holy Roman Empire after the accession of an emperor. Edward I. is said to have exercised a similar right in England, and this is supposed to have been the origin of corodies, or the King's right (now in desuetude) to have one of the royal chaplains maintained by a bishop till the latter should give him a benefice. See CORODY.

Precinct.—This word is usually applied to the enclosed grounds about some important edifice, as a palace or cathedral. It is derived from the Latin *præ* and *cingere*, and may in loose language be made to refer to any district, that is, so to speak, encompassed as with a girdle or has fixed boundaries or limits. Thus various minor territorial or jurisdictional divisions are so styled, as, for example, election precincts, school precincts, constables' precincts, etc. In the United States a parish or district attached to a church and taxed for its support is so called.

Precontract.—Previous to 1754, a contract or promise of marriage was an impediment to a subsequent union of a party to it with another person. If the contract were *per verba de presenti*, e.g. in the words “I marry you,” “you and I are man and wife,” neither party to it could release the other; but if it were *per verba de futuro*, as “I will marry” or “promise to marry you,” it was releasable (*Jesson v. Collins*, 1704, 2 Salk. 437, *per* Holt, C.J.), unless it were followed by cohabitation. If the spiritual Court pronounced against the contract, no action for damages lay in the civil Court (*Dacosta v. Villa Real*, 1734, 2 Stra. 961); and, on the other hand, an action for damages waived the spiritual remedy (*Jesson v. Collins*, *ubi supra*). On proof of a contract *per verba de presenti*, a subsequent marriage was declared void by the Court. In 1540 the impediment of precontract was for a time abolished by 32 Hen. VIII. c. 38; but 2 & 3 Edw. VI. c. 23, 1548, reciting that the removal of the impediment had led to gross abuses, enacted that thenceforward the ecclesiastical judge should hear and examine any cause or contract of marriage pretended to have been made, and if he held it proved, make an order for the specific performance of the contract, under such penalties as could be imposed before 1540. This jurisdiction was taken away by Lord Hardwicke’s Act, 26 Geo. II. c. 33, s. 13, 1753, re-enacted by 4 Geo. IV. c. 76, s. 27, 1823; and a precontract, even *per verba de presenti*, is now no barrier to a subsequent marriage (*Beachey v. Brown*, 1860, El. B. & El. 796). See also MARRIAGE.

[*Authorities.*—Swinburne, *Spousals*, 1686; Geary, *Law of Marriage and Family Relations*, 1892.]

Predecessor—One who has preceded another. In the Success. D. A. 1853, s. 2, the term “predecessor” is defined as denoting the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived. See *A.-G. v. Floyer*, 1862, 31 L. J. Ex. 404; *A.-G. v. Braybrooke*, 1860, 31 L. J. Ex. 177; *Charlton v. A.-G.*, 1879, 49 L. J. Ex. 86; *A.-G. v. Mitchell*, 1881, 50 L. J. Q. B. 406; *In re Barker*, 1861, 30 L. J. Ex. 404.

See DEATH DUTIES. See also ANCESTOR.

Pre-emption.—The right of pre-emption is the right of purchasing property before or in preference to other persons (*Sweet, Law Dict.*). An option to purchase within a given time, or at any time, without reference to any intended sale to a third party, is included under the same name. The right or option to be effective against the proposer must, of course, be founded on a consideration (see *Dickinson v. Dodds*, 1876, 2 Ch. D. 463).

A right of pre-emption is strictly construed. All conditions precedent must be fulfilled before there is any contract binding on the grantor (*Dart’s Vendors and Purchasers*, ch. vi. s. 3; *Austin v. Tawney*, 1867, L. R. 2 Ch. 143; *Weston v. Collins*, 1865, 11 Jur. N. S. 190). A verbal notice to exercise the right in the case of land is not binding (*Dawson v. Dawson*, 1837, 8 Sim. 346; see next case), apart from part performance. The retention of possession by a lessee with option of purchase, after a verbal notice, has been held to be sufficient (*Beetson v. Nicholson*, 1842, 6 Jur. 620). Whether a notice to exercise a right of pre-emption can be withdrawn (*Homfray v. Fothergill*, 1866, L. R. 1 Eq. 567), and whether if the notice is given and the giver fails to complete the right is lost (*Ward v. Wolverhampton Waterworks Co.*, 1871, L. R. 13 Eq.

243), are questions of construction of the instrument conferring the right. If the notice is properly given, it constitutes a contract which will be specifically enforced (*Homfray v. Fothergill*, *supra*).

An example of the right of pre-emption is to be found in the right frequently reserved to a lessee to purchase the freehold reversion expectant on the lease. The burden of such a provision does not run with the reversion, and therefore an assign of the term cannot enforce the provision against an assign of the reversion (*Woodall v. Clifton*, [1905] 2 Ch. 257).

A right of pre-emption unlimited in time is void as a perpetuity (*London and South-Western Rly. Co. v. Gomm*, 1882, 20 Ch. D. 562). This principle is applicable to a right of pre-emption reserved in a lease (*Woodall v. Clifton*, *ubi supra*). But the obligation imposed by such a reservation, even when not in a lease, may be given statutory validity, in which case no objection can be taken to it on the ground of remoteness (*Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37), and if the reservation amounts to a negative contract not to part with the land to anyone else without giving a "first refusal" to the person in whose favour the provision was inserted, it may be enforced against a purchaser with notice (*s.c.*). This last case is also an authority on what is meant by "first refusal."

A right of pre-emption of the share of a retiring partner or a partner dying is very frequently given by the articles of partnership to the continuing partners (see Lindley, *Partnership*, 6th ed., 424, 7th ed., 457, and *Homfray v. Fothergill*, *supra*). Where there is nothing in the articles of partnership to prohibit it, one partner may purchase the share of another for his own benefit, *i.e.* without informing the other partners, at any rate where the constitution of the partnership as regards external relations remains unaffected (*Cassels v. Stewart*, 1881, 6 App. Cas. 64). A right of pre-emption reserved to partners is enforceable even if the mode of ascertaining the value of the share (not being itself of the essence of the contract), has become impracticable (*Durham v. Bradford*, 1869, L. R. 5 Ch. 519). But where a time for exercise of the option is limited it must be strictly observed (*Dibbins v. Dibbins*, [1896] 2 Ch. 348). Where the partnership continues at will beyond the agreed term, the clause as to pre-emption continues to operate (*Daw v. Herring*, [1892] 1 Ch. 284).

Fiduciary vendors, *e.g.* trustees, ought not to give a right of pre-emption at a fixed price (*Clay v. Rufford*, 1852, 5 De G. & Sm. 768; 64 E. R. 1337).

As to the right of pre-emption in regard to "superfluous lands" taken under the LANDS CLAUSES ACTS, see Vol. VIII., at p. 26; PRE-EMPTION (INTERNATIONAL). The right under the Lands Clauses Act is not a personal right but devolves to the future proprietors of the lands from which the purchased lands were severed (*Lord Carrington v. The Wycombe Rly. Co.*, 868, L. R. 3 Ch. 377).

Pre-emption (International).—The act or right of purchasing in preference to others. In international law the term pre-emption is applied to the purchasing of neutral contraband goods in lieu of confiscation.

In considering the penalties affecting contraband, the late W. E. Hall pointed out that in strictness, every article which is either necessarily contraband, or which has become so from the special circumstances

of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit usually calculated at ten per cent. on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband (*International Law*, 5th ed., 1904, 665; see also Phillimore, *International Law*, vol. iii. ss. cclxviii.-lxx.; as to the views of continental writers upon the subject, see Calvo, *Le Droit International*, ss. 2517, 2518; Heffter, *Das Europäische Völkerrecht*, s. 161; Bluntschli, *Das moderne Völkerrecht*, ss. 806, 811).

Pre-emption is provided for by the Naval Prize Act, 1864, 27 & 28 Vict. c. 25. Sec. 38 of that Act enacts that—

Where a ship of a foreign nation passing the seas laden with naval or victualling stores, intended to be carried to a port of any enemy of His Majesty, is taken and brought into a port of the United Kingdom, and the purchase for the service of His Majesty of the stores on board the ship appears to the Lords of the Admiralty expedient, without the condemnation thereof in a Prize Court, in that case the Lords of the Admiralty may purchase, on the account or for the service of His Majesty, all or any of the stores on board the ship; and the Commissioner of Customs may permit the stores purchased to be entered and landed within any port.

The status of enemy merchant ships at the outbreak of hostilities was the subject of a Convention concluded at The Hague Conference in 1907. This Convention, after declaring that the Contracting Powers, anxious to ensure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, had resolved to conclude a Convention to that effect, contained the following provisions:—

When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out (Art. I.).

A merchant ship unable, owing to circumstances of *force-majeure*, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, cannot be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation (Art. II.).

Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities cannot be confiscated. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or to be requisitioned,

or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the security of the ship's papers.

After touching at a port in their own country or at a neutral port, these ships are subject to the laws and customs of maritime war (Art. III.).

Enemy cargo on board the vessels referred to in Articles I. and II. is likewise liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.

The same rule applies in the case of cargo on board the vessels referred to in Article III. (Art. IV.).

The present Convention does not affect merchant ships whose build shows that they are intended for conversion into war ships (Art. V.).

The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention (Art. VI.).

See CONTRABAND OF WAR; PRIZE; VISIT AND SEARCH.

Preference Stock.—See Vol. IV. p. 483.

Preferential Debts; Payments.—See Vol. II. p. 47; Vol. VI. p. 75.

Pregnancy.—See MEDICAL JURISPRUDENCE, Vol. IX., at p. 150. As to plea of, see MATRONS, JURY OF.

Prejudice.—Statements by or on behalf of one party to a dispute to the other party thereto, or his agent, made in the course of an attempt to settle the dispute, and relating to the matter in dispute, under an express or implied stipulation that the statements are to be *without prejudice* to the claims or contention of the party making them, if the attempted settlement is not effected, cannot be put in evidence against him for any purpose in litigation pending, or subsequently undertaken, to determine the dispute (*Walker v. Wilsher*, 1889, 23 Q. B. D. 335; Taylor on *Evidence*, ss. 774, 795). It makes no difference whether the statements are written or verbal. The words "without prejudice" mean without prejudice to the writer if the terms of settlement he proposes are not accepted. If the terms are accepted, a complete contract is established, and the offer, though made without prejudice, operates to alter the old state of things and to establish a new one, so that the contract made may be enforced as any other contract (*per* Lindley, L.J., in *Walker v. Wilsher*). The Court cannot, therefore, consider an offer so made, or the reply to it, even on the question of costs, as, for instance, in order to see if there is "good cause" for depriving a plaintiff who has obtained a verdict of costs (*l.c.*). But for some purposes, *e.g.* upon a question of *laches*, the Court may take notice of the fact that there has been an offer or negotiation (*per* Lindley, L.J., *ibid.*). The rule is one of public policy, and is adopted in order to enable parties to negotiate compromises.

It is not necessary that the stipulation should be explicitly made. Any offer made for the sake of peace will usually be construed not to be a relevant admission. "Any admission or confession made by the party respecting the subject-matter of the action, and obtained while

a treaty was depending under faith of it, and into which the party might be led by confidence of a compromise taking place, could not be admitted in evidence to his prejudice" (*per* Lord Kenyon in *Waldridge v. Kennison*, 1794, 1 Esp. 142).

The question often arises whether part only of a letter, conversation, or communication is protected, or the whole of it. It is well settled that the whole of the negotiation upon an offer made without prejudice is covered by the stipulation (*Paddock v. Forrester*, 1842, 3 Man. & G. 913; 60 R. R. 634; *Ex parte Harris*, 1875, 44 L. J. Bank. 33). And no part of a conversation begun without prejudice is admissible (*Thomson v. Austen*, 1823, 2 Dow. & Ry. 361), at least unless there is clear proof of a break. But evidence of an admission as to a matter not really in dispute, and not the subject of the discussion, has been admitted, *e.g.* the signature of the defendant to a bill on which he is sued (*Waldridge v. Kennison*, *supra*).

For the rule to apply there must be a dispute. So a notice to creditors of an intended suspension of payment stated by the debtor giving it to be "without prejudice," can be given in evidence on a bankruptcy petition (*In re Daintree*, [1893] 2 Q. B. 116). In the case last cited, Williams, J., said no document which in its nature may prejudice the person to whom it is addressed if the offer it contains is rejected, can be prevented from being put in evidence.

Prejudice of Purchaser.—See ADULTERATION.

Prejudice, Without.—See PREJUDICE.

Prelector.—A reader or lecturer. In the cathedral of Hereford, one of the prebendaries is elected to the office of prelector, to hold it till he succeeds to a residentiary canonry, for which he is statutably considered to have a claim to be a candidate. His duty is to preach on Tuesdays, or else on any holy day which may occur during the week for a considerable portion of the year (*Hook's Ch. Dict.*).

Preliminary Accounts.—See ACCOUNTS AND INQUIRIES, Vol. I. p. 110.

Preliminary Act.—In actions in any Division for damage by collision between vessels, unless the Court or a judge otherwise order, the plaintiff's solicitor must in seven days after beginning the action, and the defendant's solicitor within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, a document called a Preliminary Act, which shall be sealed up, and shall not be opened until the pleadings are completed and a consent signed by the respective solicitors that the Preliminary Act shall be opened is filed. The Preliminary Act shall state the following particulars:—(a) The names of the vessels colliding, and their masters; (b) the time of collision; (c) the place of collision; (d) the direction and force of the wind; (e) the state of the weather; (f) the state and force of the tide; (g) the course and speed of the vessel when the other was first seen; (h) the lights, if any, carried by her; (i) the distance and bearing of the other ship when first seen; (k) the

lights, if any, of the other vessel first seen; (*l*) whether any lights of the other vessel, except those first seen, came into view before the collision; (*m*) what measures were taken, and when, to avoid collision; (*n*) the parts of each vessel first coming in contact; (*o*) what sound signals (if any) and when were given; (*p*) what sound signals (if any) and when were heard from the other vessel.

The Court or a judge may order the Preliminary Act to be opened without its being necessary to deliver pleadings; but, in such case, if either party intends to rely on the defence of compulsory pilotage, he may do so by giving written notice to the other party within two days from the opening of the Preliminary Act (R. S. C., Order 19, r. 28, as amended by R. S. C., August 1898, and November 1900). In practice it is usual to use numbers instead of letters for the paragraphs (Williams and Bruce, *Admiralty Practice*, 3rd ed. 367).

The use of preliminary acts began with the Admiralty Court Rules of 1885 (*The Inflexible*, 1856, Swa. Ad. 33); and their object was stated to be "to obtain a statement from the parties of the circumstances *recenti facto*, and to prevent either party shaping his course to meet the case put forward by his opponent" (Dr. Lushington, *The Vortigern*, 1859, Swa. Ad. 518; *The Frankland*, 1872, L. R. 3 A. & E. p. 511).

Preliminary acts are required only in cases of collisions between ships, e.g. in an action for damages for the death of a seaman, brought against a ship negligently colliding with the ship on board which the seaman was serving (*Webster v. Manchester, Sheffield, and Lincolnshire Rly. Co.*, 1884, W. N. 1); though as the Admiralty Division has no jurisdiction under Lord Campbell's Act, 9 & 10 Vict. c. 93 (*The Vera Cruz*, 1884, 10 App. Cas. 59), the action may have to be transferred to or brought in the King's Bench Division. They have been declared necessary in a case where the owners of cargo in a barge have sued the owners of a ship colliding therewith (*Secretary of State for India v. Hewitt*, 1889, 6 Asp. 384); and in a case in the Admiralty Court, where the owner of a barge sued the owners of a tug for damage done to the barge and its cargo by the tug's towing her into collision with another vessel (*The Alexandra*, Butt, J., 6 Asp. 384*n.*); but in a previous case of similar circumstances in the Queen's Bench, the Court refused to order preliminary acts to be filed (*Armstrong v. Gaselee*, 1889, 6 Asp. 353; 22 Q. B. D. 250). Preliminary acts have been held unnecessary in a case where the owner of cargo damaged by collision sued the ship carrying the cargo, on the ground that the collision was caused by its negligence (*The John Boyne*, 1877, 3 Asp. 341); for "mutuality is essential to their use" (Sir R. Phillimore, *ibid.*).

The rule for filing preliminary acts extends to all Divisions of the High Court (*Secretary of State for India v. Hewitt*, above). They must be filled up accurately, or their costs may be disallowed (Williams and Bruce, *Admiralty Practice*, 368 (*n.*)*f.*). Thus it is not a sufficient description of "the distance and bearing of the other ship when first seen" to say she is "at anchor" (*The Godiva*, 1886, 11 P. D. 20). A party may not contradict his Preliminary Act at the hearing, or amend a mistake in it before the hearing (*The Miranda*, 1881, 7 P. D. 185). But a party who has filed a defective Preliminary Act not properly answering the questions, may be ordered to amend it (*The Godiva*, 1886, 11 P. D. 20). In a collision action, where the plaintiff's vessel was lost with all the crew who could give evidence as to the collision, the

plaintiffs were allowed, before filing a statement of claim, to administer interrogatories to the defendants as to the circumstances of the collision, including information given in their preliminary act (*The Isle of Cyprus*, 1890, 6 Asp. 534).

In Admiralty actions preliminary acts are filed at the Admiralty Registry, Royal Courts of Justice (fee 5s.) and remain there sealed up until the consent is filed. In cases in the King's Bench Division, preliminary acts are filed at the Writ, etc., Department of the Central Office (fee 2s. 6d.) and transmitted to the General Filing Department where the consent to open must be produced (*Annual Practice*, Order 19, r. 28, note). For the practice generally see Williams and Bruce, *Admiralty Practice*, 3rd ed., 1902.

FORMS.

I. PRELIMINARY ACTS AND PLEADINGS IN AN ACTION OF DAMAGE WHERE THE COLLISION WAS AT NIGHT TIME AND THE VESSEL PROCEEDED AGAINST WAS IN CHARGE OF A PILOT BY COMPULSION OF LAW.

[For other pleadings, see COLLISIONS AT SEA, Vol. III. p. 177.]

Folios 36.

Writ issued day of April 19 .

Between The Owners of the paddle steam tug *George Peabody* Plaintiffs,

and

The Owners of the steamship *Vadso*, now known as the steam-ship *Holar*¹ Defendants.

Holar, 1900, G., No. 814, Fol. 177.

Preliminary Acts.

	Preliminary Act on behalf of the Plaintiffs.	Preliminary Act on behalf of the Defendants.
The names of the vessels which came into collision and the names of their masters.	I. The <i>George Peabody</i> , John Parker, master. The ss. <i>Vadso</i> , now known as the ss. <i>Holar</i> , J. Paulsen, master.	I. The <i>Vadso</i> , H. Paulsen, master. The <i>George Peabody</i> , —— master.
The time of the collision.	II. The 15th February 1896, about 2 A.M.	II. About 1.20 A.M. on the 15th of February 1896.

¹ If the freight is also proceeded against, add "and the owners of the freight due for the transportation of the cargo now or lately laden therein."

	Preliminary Act on behalf of the Plaintiffs.	Preliminary Act on behalf of the Defendants.
The place of the collision.	III. Blyth Harbour.	III. Blyth Harbour, about 100 yards inside the west pier end, as far over on the west side of the channel as the <i>Vadso</i> could safely be.
The direction and force of the wind.	IV. Westerly : a light breeze.	IV. North north-east ; a light breeze.
The state of the weather.	V. Dark but clear.	V. Fine and clear.
The state and force of the tide.	VI. Flood, of a force of from two to three knots.	VI. Half flood, three to four knots.
The course and speed of the vessel when the other was first seen.	VII. Following close in the wake of the steamship <i>Volturmo</i> which was keeping as close as possible to the east side of the channel under port helm. Speed about six knots over the ground.	VII. Proceeding down, keeping on the west side of the channel, and making about two knots over the ground, with engines at dead slow.
The lights, if any, carried by her.	VIII. The regulation masthead towing and side lights for a steam tug towing.	VIII. The regulation lights for a steam vessel under way.
The distance and bearing of the other vessel when first seen.	IX. The lights of the <i>Vadso</i> which had been shut out by the <i>Volturmo</i> , came into sight close to on the port bow of the <i>George Peabody</i> .	IX. Between half and three-quarters of a mile off, bearing a little on the port bow.
The lights, if any, of the other vessel which were first seen.	X. Masthead and red lights.	X. The two white lights of the head tug were first seen.
Whether any lights of the other vessel, other than those first seen, came into view before the collision.	XI. No.	XI. Yes, the red light of the head tug and the red light of vessel in tow, and just before the collision all the lights of <i>George Peabody</i> were seen.

	Preliminary Act on behalf of the Plaintiffs.	Preliminary Act on behalf of the Defendants.
What measures were taken, and when, to avoid the collision.	XII. When the lights of the <i>Vadso</i> were first seen from the <i>General Gordon</i> and the <i>Volturno</i> , the steam whistles of the <i>General Gordon</i> and of the <i>Volturno</i> were sounded the port helm signal, which was answered by the <i>Vadso</i> and the <i>Volturno</i> , and her tugs were kept as close as possible to the Harbour Commissioners' dredger on the east side of the channel under port helm, the <i>George Peabody</i> following close in the wake of the <i>Volturno</i> .	XII. The whistle of the <i>Vadso</i> was blown single long blasts at about minute intervals, and the <i>Vadso</i> was kept as far on the west side of the channel as possible. Her engines were put for a turn or two half speed when passing the vessel in tow.
The parts of each vessel which first came in contact.	XIII. Stem of the <i>Vadso</i> , port paddlebox of the <i>George Peabody</i> .	XIII. The fore part of the port paddle casing of the <i>George Peabody</i> and the bluff of the port bow of the <i>Vadso</i> .
What sound signals (if any) and when were given.	XIV. When the <i>Vadso</i> was seen the steam whistles of the <i>General Gordon</i> and the <i>Volturno</i> were sounded the port helm signal.	XIV. The whistle of the <i>Vadso</i> was blown single long blasts at about minute intervals from the time the incoming vessels came in sight until the collision.
What sound signals (if any) and when were heard from the other vessel.	XV. The port helm signal in reply to the signals of the <i>General Gordon</i> and the <i>Volturno</i> .	XV. The whistle of the steamship on which the <i>George Peabody</i> was attending was heard answering the <i>Vadso's</i> whistle; it is not known if any whistle of the <i>George Peabody</i> was heard.
	This 6th day of June 1900. Agents for Blyth, Solicitors for plaintiffs.	This 5th day of June 1900. Solicitors for defendants.

II. PRELIMINARY ACTS WHERE THE COLLISION WAS BETWEEN TWO SAILING VESSELS.

[For other Pleadings, see COLLISIONS AT SEA, Vol. III. p. 180.]

Heathfield, 1900, A., No. 1337, Fol. 353.

Preliminary Acts.

	Preliminary Act on behalf of the Plaintiffs.	Preliminary Act on behalf of the Defendants.
The names of the vessels which came into collision, and the names of their masters.	I. The four-masted barque <i>Ancyra</i> , Stuart, master. The barque <i>Heathfield</i> , Fraser, master.	I. The barque <i>Heathfield</i> , James Fraser, master. The four-masted barque <i>Ancyra</i> , — master.
Time of collision.	II. About 1.45 A.M., 29th January 1900.	II. About 1.50 A.M. on Monday, January 29, 1900.
Place of collision.	III. About lat. 36°40' N., long. 129°17' W.	III. In the North Pacific in about latitude 37° N. and longitude 129°30' W.
Direction and force of the wind.	IV. S.E. $\frac{1}{2}$ S. magnetic, moderate breeze.	IV. About S.E., moderate breeze.
State of the weather.	V. Clear.	V. Fine and clear.
State and force of the tide.	VI. —	VI. No current perceptible.
The course and speed of the vessel when the other was first seen.	VII. Close-hauled on the port tack heading S.W. $\frac{3}{4}$ S. Southerly magnetic, speed about 5½ to 6 knots.	VII. Close-hauled on the starboard tack, heading about E.N.E. and making about 5 knots an hour.
The lights, if any, carried by her.	VIII. Regulation lights.	VIII. The regulation side lights.
Distance and bearing of the other vessel when first seen.	IX. About 1½ miles distant and about 1½ points on the starboard bow.	IX. Distant about 2 miles and bearing about a point on the port bow.
The lights, if any, of the other vessel which were first seen.	X. The red light.	X. The green light.

	Preliminary Act on behalf of the Plaintiffs.	Preliminary Act on behalf of the Defendants.
Whether any lights of the other vessel other than those first seen came into view before the collision.	XI. The green light.	XI. The red light.
What measures were taken, and when, to avoid the collision.	XII. As soon as the position of the <i>Heathfield</i> had been carefully ascertained, the helm of the <i>Ancyra</i> was hard-a-ported, the after stay-sail and spanker hal-yards and lee cross jack braces let go and orders given to stand by the weather cross jack braces. When the red light was brought well clear on the port bow, the order as to the weather braces was countermanded. When the <i>Heathfield</i> suddenly opened her green light and shut in her red she was loudly hailed.	XII. The <i>Heathfield</i> was kept on her course close-hauled by the wind, and when the <i>Ancyra</i> opened her red light on the star-board bow of the <i>Heathfield</i> the helm of the <i>Heathfield</i> was put hard down.
Parts of each vessel which first came in contact.	XIII. The jibboom of the <i>Heathfield</i> and the jigger rigging and spanker boom of the <i>Ancyra</i> .	XIII. The horn and stem of the <i>Heathfield</i> , the port quarter of the <i>Ancyra</i> .
What sound signals (if any) and when were given.	XIV. None.	XIV. None.
What sound signals (if any) and when were heard from the other vessel.	XV. None.	XV. None.
	Dated this 12th day of October 1900. Plaintiffs' solicitors.	This 19th day of October 1900. Defendants' solicitors.

Preliminary Expenses.—In company formation the preliminary expenses are *prima facie* payable by the party who incurs them (*Skegness and St. Leonards Tramways Co.*, 1888, 41 Ch. D. 215, 241; *Rotherham Alum Co.*, 1883, 25 Ch. D. 103; *In re Empress Engineering Co.*, 1880, 16 Ch. D. 125; *Melhado v. Porto Alegre Rly. Co.*, 1874, L. R. 9 C. P. 503; *Shrewsbury v. North Staffordshire Rly. Co.*, 1865, L. R. 1 Eq. 593; *Wyatt v. Metropolitan Board of Works*, 1862, 11 C. B. N. S. 744). The reason is that a company cannot be liable under a pre-incorporation contract, even though it has had the benefit of work done under the contract. If solicitors, for instance, do work and incur expense in forming a company, they must look for payment to their actual employer, the promoter, except as to the registration fees, which the company is under a statutory liability to pay (*In re English and Colonial Produce Co.*, 1906, 75 L. J. Ch. 831; [1906] 2 Ch. 435, C. A.). And it makes no difference that the company's articles contain a clause providing for payment of preliminary expenses, for such a clause only operates as an authority by the shareholders to the directors to pay such expenses; it does not constitute a privity of contract between the person, promoter, or solicitor incurring the expense and the company, enabling him to sue the company. The company may, however, after incorporation, by contract expressly adopt what the promoter has done, and in that case it will be possible to sue it (*Touche v. Metropolitan Rly. Warehousing Co.*, 1871, L. R. 6 Ch. 671), provided what has been done is not *ultra vires* (*Shrewsbury v. North Staffordshire Rly. Co.*, *supra*). Solicitors' expenses for getting a bill through Parliament are promotion expenses (*In re Brampton and Longtown Rly. Co.*, 1870, L. R. 10 Eq. 613); and as such are usually authorised to be paid by the special Act of the company as part of the costs of and incident to the passing of its Act, but such an authority will not include the payment of work done for the promoters (*In re Kent Tramways Co.*, 1879, 12 Ch. D. 312). If a public body incurs preliminary expenses in connection with works that are not carried out, these will, if *intra vires*, be payable out of a rate levied on the occupiers (*Griffiths v. Longdon Drainage Board*, 1871, L. R. 6 Q. B. 738). See MUNICIPAL CORPORATION, Vol. IX. p. 745.

Sometimes a clause in articles of association providing for the company paying the expenses of its promotion may be rejected as fraudulent (*In re Eskern Slate and Slab Quarries Co.*, 1877, 37 L. T. 222), and money paid under such a clause will have to be replaced (*In re London and Provincial Starch Co.*, 1869, 20 T. L. 390; but see *In re The Masons Hall Tavern Co.*, 1869, 21 L. T. 221). In such a case the directors will be held jointly and severally liable for the money wrongfully expended (*In re Carriage Co-operative Association*, 1884, 27 Ch. D. 322; *In re Englefield Colliery Co.*, 1877, 8 Ch. D. 388). If a director has misappropriated the company's money, he cannot afterwards set off a debt for preliminary expenses against his liability for the misappropriation (*In re Anglo-French Co-operative Society, Ex parte Pelly*, 1882, 21 Ch. D. 492). But directors can always get back advances properly made for the company by way of preliminary expenses not prior to incorporation (*In re Carriage Co-operative Association, supra*).

A misrepresentation in a prospectus that the vendor pays preliminary expenses will entitle a shareholder to rescind (*In re Liberian Government Concessions*, 9 T. L. R. 136).

Premier.—See PRIME MINISTER; CABINET.

Premises, Dangerous.—1. As to buildings, etc., likely to endanger public safety, see DANGEROUS STRUCTURE, Vol. IV. p. 340. Besides the statutes and cases there referred to, see Public Health, etc., Act, 1907, 7 Edw. VII. c. 53, s. 30; *L. C. C. v. Bernstein*, 1897, 61 J. P. 630; *Crisp v. L. C. C.*, [1899] 1 Q. B. 720 (liabilities of the County Council (arbitration)); and as to service of notices relating to dangerous structures, London, 61 & 62 Vict. c. cxxxvii. s. 5; and as to dangerous party structures, 57 & 58 Vict. c. cxxiii. s. 90. It should also be noted that in London a site cleared of a dangerous structure may not be built on until the charges of the London County Council with reference to the clearing, etc., have been paid (57 & 58 Vict. c. cxxiii. ss. 116, 117). A register of such cases is kept by the Council, and it should be inspected on behalf of purchasers of cleared sites.

The provisions stated above, and under the title dangerous structure, are alternative to the common-law remedy by indictment in the case of buildings near streets dangerous to the public passing by (*R. v. Watts*, 1703, 1 Salk. 356; 2 Ld. Raym. 856). As to projections from premises over streets, see HANGING SIGNS, Vol. VI. p. 509.

2. Where injury is caused to any passenger in a street by a dangerous structure, the occupier is liable (*Tarry v. Ashton*, 1876, 1 Q. B. D. 314; *Bower v. Peate*, 1876, 1 Q. B. D. 321). Where the premises are let the owner is, as a general rule, not liable to the public (*Pretty v. Bickmore*, 1873, L. R. 8 C. P. 401; *Todd v. Flight*, 1861, 9 C. B. N. S. 377; *Gwinnell v. Eamer*, 1875, L. R. 10 C. P. 658). But such liability has been held to exist where a common stair in a building let in flats was dangerous (*Miller v. Hancock*, [1893] 2 Q. B. 177). See Beven on *Negligence*, 3rd ed., 411, 448. As between landlord and tenant, the landlord is in no way responsible to the tenant for the dangerous condition of the premises, unless he has expressly contracted to be so, except in the following cases:—

(i.) Where the house is let furnished (*Wilson v. Finch Hatton*, 1877, 2 Ex. D. 336);

(ii.) Where the premises let are let to persons of the working classes under sec. 75 of the Housing of the Working Classes Act, 1890, as amended by sec. 12 of the Act of 1903, c. 39. Under these sections the contract of tenancy is by statute held to contain a condition or warranty that the premises are habitable at the beginning of the tenancy (*Bowen v. Anderson*, [1894] 1 Q. B. 164). See Beven, *Negligence*, 3rd ed., 411, 415, 416.

Premium.—A consideration; something given to invite a loan or bargain; as the annual payment upon insurances; a fee paid for the privilege of being taught a trade or profession; the consideration paid to the assignor by the assignee of a lease, or to the transferor by the transferee of shares or stock, etc. In stockbroking, the value above the original cost or price, as of shares or stock, as opposed to discount, which is the value below the original cost.

Premunire.—See PRÆMUNIRE.

Prerogative Court.—This was the Court of the Archbishop of Canterbury, “wherein all testaments are proved and administrations granted, where the party dying within the province hath *bona notabilia* in some other diocese than where he dieth; and is so called

from the archbishop having a prerogative through the whole province for the said purposes; and from this Court an appeal lieth to the King in Chancery" (Burn, *Eccles. Law, Prerogative Court*). The jurisdiction of the Court was transferred to the Probate Court in 1857 by the Probate Court Act, which provided that the voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other Courts and persons in England having at the passing of the Act jurisdiction to grant or revoke probate of wills or letters of administration of effects of deceased persons should cease, and no such Court or person shall exercise such jurisdiction; and that the Probate Court should have the same powers, and its grants and orders should have the same effect throughout England, and in relation to personal estate in all parts of England of deceased persons as the Prerogative Court of the Archbishop of Canterbury and its grants and orders have now in the province of Canterbury, and the duties of ordinaries in the Prerogative Court in respect of probates, administrations, and matters or causes testamentary within their respective jurisdictions pass to the Probate Court; and the registrars of the principal registry have the same power with reference to proceedings in the Probate Court as the surrogates of the judge of the Prerogative Court could have exercised in chambers with reference to proceedings in the Prerogative Court. By the Judicature Act of 1875 the Court of Probate was merged in the High Court.

Prerogative Legislation.

TABLE OF CONTENTS.

I. GENERALLY	449	III. FOR GREATER BRITAIN	453
II. FOR THE UNITED KINGDOM	450		

Index of Existing Subjects of Prerogative Legislation.

Appeals to Judicial Committee	453	Colonial Constitutions	453
Army and Territorial Force	450	Colonial Laws	453
Ceremonial Matters	452	Legal Procedure	451
Channel Islands	454	Navy and Marines	450
Civil Services	451	Protectorates	454
Colonial Coinage	454		

I. GENERALLY.

Successive Narrowing of the Prerogative of Legislation.—The supreme legislative power is shared by the Crown with Parliament: this article is confined to that legislative power which is in the Crown alone. The gradual encroachment of Acts of Parliament on the field of legislation which formerly pertained exclusively to the Crown, forms no small portion of the history of England and of the Statute Book. References to various matters formerly legislated for by ORDER IN COUNCIL and PROCLAMATION is made in those articles.

The grant of a FRANCHISE (see that article, and judgment of Farwell, J., in *A.-G. v. Trustees of British Museum*, [1903] 2 Ch., at p. 612) was in many cases a delegation, or alienation, of certain parts of the prerogative, and in the cases of the higher franchises, such as the creation of a county palatine, conveyed certain powers of legislation.

Freedom of person and property, taxation, and the regulation of

trade, are familiar instances of subjects over which Parliament has (but had not in past times) exclusive and direct control. But besides such matters as are at the root of the existence of a free nation, there are others of a more administrative character in which Parliament now possesses, or at least shares, the control formerly exclusively in the Crown. The coinage (see COIN), the care of lunatics (see LUNACY), and MARKETS AND FAIRS, PATENTS, and WEIGHTS AND MEASURES (*q.v.*) are now regulated by statute instead of by prerogative ordinance, and the navy and army are governed by codes of regulations which are in part statutory or sub-statutory (see DELEGATED LEGISLATION) and in part prerogative.

Exercise and Control of Prerogative.—The legislative, as the other powers of the Crown, are exercised on the advice of the Ministry for the time being; Parliament has therefore an indirect, though often a *post factum*, control. But control also rests with the Courts, who have power to determine whether a legislative act by the Crown alone is, or is not, within the powers of the prerogative, and to declare invalid any such act not within such powers.

Field of Prerogative Legislation.—So far as regards the United Kingdom, this is in practice almost exclusively confined to the regulation of the services of the Crown (see sub-headings "Navy and Marines," "Army and Territorial Force," and "Civil Services" below), and of ceremonial and matters connected with the royal accession (see sub-heading "Ceremonial Matters" below). But there is apart from, though in many cases superseded by, and in nearly all controlled by, statute, an inherent jurisdiction in a Court to regulate its procedure (see sub-heading "Legal Procedure" below), and such regulation is a form of delegated prerogative legislation.

In Greater Britain legislation by the Crown plays a much greater part, and indeed at certain stages in the organisation of territories, as they pass from spheres of British influence to self-governing communities, an exclusive one.

II. FOR THE UNITED KINGDOM.

Navy and Marines.—Until 1661, the regulation of the sea forces of the country was purely within the prerogative. The Act 13 Car. II. c. 9, which established "Articles and Orders for the regulateing and better government of His Majesties Navies, Ships of Warr, and Forces by Sea," was the foundation of that long series of naval discipline Acts of which the provisions of the Act of 1866 (29 & 30 Vict. c. 109), as amended in 1884 (47 & 48 Vict. c. 39) (see article NAVY), are the outcome.

The King's Regulations for the navy (which also govern the ROYAL MARINES) (*q.v.*), are a code of regulations, partly prerogative and partly statutory, and sanctioned by Order in Council. On the other hand, the regulations governing the NAVAL RESERVE (*q.v.*) and the naval volunteers are purely statutory.

Army and Territorial Force.—Like the sister service, the army was in early years controlled wholly by prerogative ordinance, and the Mutiny Act, 1689, 1 W. & M. c. 5, was the first inroad of Parliament into this sphere. The Bill of Rights, 1 W. & M. sess. 2, c. 2, established that the maintenance of a standing army in times of peace is unlawful without the consent of Parliament; and therefore sanction to such force is given by an annual Act (see 7 Edw. VII. c. 2) which brings into force

the Army Act which is the statutory code of regulations (see ARMY). The power to issue articles of war in time of war is now statutory, the prerogative power of issue being superseded.

Pay, promotion, and other matters are governed by The King's Regulations for the Army—a code which, issued under the sanction of the Army Council, derives its authority in greater part from the Prerogative, but in which are embodied such STATUTORY ORDERS (*q.v.*) as relate to the service. It is amended by army orders which, like the main code—which is a consolidated code of previous army orders—are sometimes prerogative and sometimes statutory. The abolition of purchase was effected by Royal Warrant of July 20, 1871, Mr. Gladstone, on failing to get through his Purchase Abolition Bill, having recourse to the power of prerogative legislation.

The distribution of the forces into corps and divisions is regulated by royal warrant.

The new Territorial Force is purely the creation of statute, and, like the yeomanry and volunteer units which have been transferred to it, will be governed by regulations made under statutory powers. The militia will be transformed into special reservists of the army reserve, which is also of statutory origin and governed by statutory rules.

Civil Services.—The status, rights, pay, and promotion of the home Civil Service are regulated by Orders in Council issued under the Royal Prerogative. These (of which nine are now in force) are published at length in the Foreign Office List, 1908, pp. 53-61. The first Order (May 21, 1855) established examinations (see CIVIL SERVICE), and that of June 4, 1870, introduced the system of open competition which has now been almost generally applied. A further Order in Council of November 29, 1884, provides for a civil servant resigning office on becoming a parliamentary candidate. The establishments of the Secretary of State for India in Council, of the Comptroller and Auditor-General, and those of the three General Lighthouse Authorities, form exceptions to the rest of the home service, in that they are regulated by Orders in Council under statutory powers (Government of India Act, 1858, s. 15; Exchequer and Audit Departments Act, 1866, s. 8; Merchant Shipping Act, 1894, ss. 659, 738). The Indian Civil Service is also governed by regulations under statute.

The Rules and Regulations for His Majesty's Colonial Service are a code issued under the sanction of the Secretary of State for the Colonies, in which are embodied provisions partly statutory and partly prerogative. As recently revised, but not yet approved by the Secretary of State, they are printed in the Colonial Office List, 1908, pp. 611-650. The Regulations for the Diplomatic Service (see DIPLOMATIC AGENTS), and the rules as to the occupation and maintenance of embassy and legation property in foreign countries, are of a prerogative character, and are similarly issued by the Secretary for Foreign Affairs; they are printed in the Foreign Office List, 1908, pp. 74-76, and pp. 142-148 respectively.

Pensions (except for the Indian Service, pensions in which are regulated by Indian Acts) are governed by the Superannuation Acts, and by Treasury Warrants and Regulations thereunder (see St. R. & O., Rev. 1904, vol. ix., "Pension and Half Pay").

Legal Procedure.—The Supreme Court and County Court Rules (see COUNTY COURTS; RULES—RULES OF COURT) are made under statutory powers, as are most of the rules of borough and other local civil Courts (see INFERIOR COURTS), and all rules of these last Courts made since

1884. But subject to, and so far as not superseded by, statutory provisions, there is an inherent jurisdiction in every Court to regulate its procedure. The existing Chancery of Durham Rules (which were made before the statutory power of rule-making was conferred by 52 & 53 Vict. c. 47 in 1889), and the Standing Orders of Quarter Sessions, are cases of procedure legislation under a delegated prerogative power; most of the procedure of Quarter Sessions is, however, prescribed directly by statute.

Ceremonial Matters.—It will be necessary now to deal briefly with the Orders in Council and Proclamations which, under prerogative powers, are issued on certain high occasions of State, or to regulate matters of ceremony.

The Proclamations on the Unions with Scotland and Ireland respectively, declaring the Royal Style and Arms, and the Union Jacks, were issued under statutory powers, as were those adding to the Royal Titles with regard to India and the Colonies (St. R. & O., Rev. 1904, vol. i., "Arms, Ensigns," etc.). But the use of the red, white, and blue ensigns is regulated by a Prerogative Order in Council of July 1, 1864 (see p. xvii. of the Admiralty "Flags of All Nations"), which as regards the red ensign has subsequent statutory authority (52 & 53 Vict. c. 73, s. 1, reproduced in 57 & 58 Vict. c. 60, s. 73).

It has hitherto been the practice for a Sovereign on his accession (see ACCESSION OF SOVEREIGN) to issue a Proclamation requiring all persons being in office of authority or government "to proceed in the execution of their respective offices." Similar Proclamations to that of King Edward VII. (St. R. & O., Rev. 1904, vol. iv., "Crown," p. 1) were issued by earlier sovereigns; *cf.* that of James the First, April 5, 1603. On the accession of George the First the Proclamation was (August 1, 1714) made by the Lords Justices. But the Demise of the Crown Act, 1901 (see DEMISE OF THE CROWN), makes all such future Proclamations unnecessary. It has also been the almost invariable custom of a Sovereign on his accession to issue a Prerogative Order in Council granting exemption from jury service, etc., to his servants in ordinary, and a Proclamation encouraging piety and virtue.

Alterations as to the names of the Royal Family in the Prayer-Book are made by Statutory Order in Council under the Act of Uniformity, 13 & 14 Car. II. c. 4, s. 25, but the forms of service for the anniversaries of the Gunpowder Plot, the Execution of Charles the First, and Oak Apple Day were discontinued by a Royal Warrant (*London Gazette*, January 8, 1859, p. 161) issued under the prerogative, but in accordance with Addresses from Parliament.

The Sovereign's "Pleasure touching his Royal Coronation and the Solemnity thereof" is also signified by a Prerogative Proclamation (*London Gazette*, June 28, 1901, p. 4329), which establishes the COURT OF CLAIMS (*q.v.*). Since the coronation of George the Fourth it has been the custom by this Proclamation to dispense with the parts of the ceremonial formerly performed in Westminster Hall and in connection with the procession, and to cut down the questions to be dealt with by the Court of Claims accordingly.

Public holidays, as well as days of fast or thanksgiving, were formerly appointed by prerogative proclamation. Since the passing of the Bank Holiday Act, 1871, the proclamation of a holiday assumes statutory form (*London Gazette*, July 29, 1902, p. 4833).

III. FOR GREATER BRITAIN.

Colonial Constitutions.—The annexation of territories to the British dominions is effected by Prerogative Proclamation, and the erection of such territories into a colony by Prerogative Letters Patent. Likewise, "prerogative" are the Letters Patent which provide for the government of the Crown colonies, and establish executive and legislative councils, and in some cases assemblies therein—save in the cases, *e.g.* JAMAICA, GRENADA, and ST. VINCENT (*q.v.*), where the constitution is declared by a Statutory Order in Council under an Imperial Act.

All the federal constitutions within the empire (see AUSTRALIA, CANADA, and LEEWARD ISLANDS) are statutory. In most colonies possessing representative institutions those institutions flow from an Act of the colonial legislature, assented to by an Order in Council, sometimes, *e.g.* VICTORIA (*q.v.*), under express *ad hoc* statutory powers, and sometimes, *e.g.* SOUTH AUSTRALIA (*q.v.*), under provisions as to the reservation of colonial bills for the Royal Assent, contained in Imperial Acts forming part of the Crown colony constitution. [For the existing law as to the reservation of Bills of the Australian State Legislatures, see article NEW SOUTH WALES, Vol. IX. p. 642.] But in NEWFOUNDLAND (*q.v.*) and Barbados the representative institutions were conferred by prerogative legislation.

Where responsible government is added, it is introduced by a document issued under the prerogative, viz., by Royal Instructions to the Governor. In the cases, however, of our two youngest colonies—the Orange River and the Transvaal—each stage of progress from annexation to His Majesty's dominions, to the grant of full responsible government, has been effected by prerogative legislation.

Colonial Laws.—In all colonies except the self-governing ones (see article COLONY) and Bahamas, Barbados, Bermuda, British Honduras, and the Leeward Islands, there is power to legislate by an Order in Council, which, except in the cases of ST. HELENA and the STRAITS SETTLEMENTS (*q.v.*), where it is under express statutory power, is a Prerogative Order. This power, extensively used in GIBRALTAR (*q.v.*), is in supplementation of the ordinances of the colonial legislature.

Further, legislation by the colonial Governor as viceroy of the Crown is prerogative, as apart from statutory, legislation. In colonies not possessing a legislative council (*e.g.* Gibraltar and Basutoland) all the local legislation is of the prerogative class. Again, the Prerogative Letters Patent establishing or altering the form of the government of the colony usually provide for a vice-regal proclamation to bring them into force; unless this delegated authority is exercised within nine, or in the case of the nearer possessions six, months, the Letters Patent are void (26 & 27 Vict. c. 76).

In many of the colonies, *e.g.* CAPE OF GOOD HOPE, CEYLON (*q.v.*), the origin of the Supreme Court was a Prerogative Charter of Justice—in others, *e.g.* NEWFOUNDLAND, TASMANIA (*q.v.*), such a charter was issued under an *ad hoc* Imperial Act. In nearly every case (Gibraltar and the Seychelles are exceptions), the colonial judicature is now regulated by colonial Act.

Two classes of prerogative colonial laws, those affecting appeals to His Majesty in Council, and colonial currency, call for further notice.

Appeals to Judicial Committee.—Most of the rules governing appeals

to His Majesty in Council (see PRIVY COUNCIL) are statutory, but the special rules as to certain colonies, *e.g.* BRITISH HONDURAS, MALTA (*q.v.*), are established by Prerogative Orders in Council.

Colonial Coinage.—Previously to the issue ten years ago of Statutory Proclamations putting the Imperial Coinage Acts in force in most of our colonial empire, colonial currency was regulated almost exclusively by Prerogative Order in Council. Such Prerogative Orders now regulate the standard coinage only in the Eastern (*i.e.* rupee and dollar standard) colonies, but in the West African and West Indian colonies they still prescribe the rates at which certain foreign coins pass current.

Channel Islands.—There is power to legislate by Prerogative Order in Council for these islands. In Jersey, the States claim that laws are not binding until registered in the Royal Court, and that Court claims the right to suspend registration of Orders in Council (see CHANNEL ISLANDS); and in several cases the Crown has consented to withdraw Orders locally objected to and made without the States' consent. In Guernsey the unrestricted character of the prerogative legislation is not thus questioned. Amongst the Prerogative Orders in Council legislating for the States are those of 1671 and 1823 as to the administration of justice and appeals to His Majesty in Council (St. R. & O., Rev. 1904, vol. vi., "Judicial Committee," pp. 30, 44), those of July 19, 1619, and March 28, 1771, as to the legislative powers of the States of Jersey, and an Order of July 25, 1861, reviving the office of Controle du Roi for Guernsey.

Protectorates.—The foundation of a British PROTECTORATE (*q.v.*) is a Prerogative Proclamation declaring the territory under British protection, or (as in the cases of South Africa and North Borneo) the entrustment of administration to a company by a Prerogative Charter (see article COMPANIES, CHARTERED), save where, as in the cases of CYPRUS and WEI-HAI-WEI (*q.v.*), the transfer of territorial administration to British hands is by treaty with a sovereign Power. The subsequent legislation for a protectorate is almost invariably derived from the Foreign Jurisdiction Act (see FOREIGN JURISDICTION), and is therefore statutory. It is not until the protectorate (*e.g.* Amatongaland, see NATAL) is declared British territory that the stage of prerogative legislation is again reached.

[*Authorities.*—Chitty, *Prerogative*; Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Oxford), 1892; Ilbert, *Government of India*; Anson, *Law and Custom of the Constitution*; Craies, *Construction and Effect of Statute Law*.]

Prerogative Writs.—The common law of England regards the King as the source or fountain of justice (see PREROGATIVE), and certain ancient remedial processes of an extraordinary nature have from the earliest times issued from the Court of King's Bench, in which the Sovereign at an early period presided in person, and in which he was always present in contemplation of law. These extraordinary remedies have been known as prerogative writs, and are issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. The prerogative writs in present use are the writs of HABEAS CORPUS; MANDAMUS; PROHIBITION; CERTIORARI; PROCEDENDO. Among those formerly in use were the writs of QUO WARRANTO and NE EXEAT REGNO.

In the words of Lord Mansfield: "Writs not ministerially directed

—sometimes called prerogative writs, because they are supposed to issue on the part of the King, such as writs of *mandamus*, *prohibition*, *habeas corpus*, *certiorari*—upon a proper case, may issue to every dominion of the Crown," including Ireland, Berwick, the Isle of Man, the Channel Islands, and the colonies, but not to Scotland (see *R. v. Cowle*, 1759, 2 Burr. p. 855). This wide common-law jurisdiction has, however, to some extent been restricted and regulated by statute; for example, the writ of *habeas corpus* is not now issued to any British colony having a competent judicature of its own (see Habeas Corpus Act, 1862, 25 & 26 Vict. c. 20).

The Court of King's Bench retained all the jurisdiction of the *Curia regis* in so far as it was not distributed among the other Courts; and this jurisdiction, including the granting of the prerogative remedies, is now, under the provisions of the Judicature Acts, vested in the High Court of Justice.

It may be useful here to indicate very briefly the nature and object of the various prerogative remedies which are used in modern practice.

Of the prerogative writs the writ of *habeas corpus ad subjiciendum* is the best known. It is the most important in its objects, protecting the right of personal liberty and providing a remedy for its violation, and is characteristic of the English common law and the English constitution enabling as it does the Courts to supervise the action of the executive, and to afford an efficient security for the liberty of the subject. The writ of *habeas corpus* is a prerogative writ by which the King has a right to inquire the causes for which any of his subjects are deprived of their liberty; it is a writ of right, though not of course, for it is not granted except upon cause shown, but it is grantable *ex debito justitiæ* (see *per* Lord Mansfield, C.J., *R. v. Cowle*, 1759, 2 Burr., at p. 855; *per* Lord Eldon, *Crowley's Case*, 1818, 2 Swans., at pp. 48, 61; 36 E. R. 514; 48 R. R. 667; *Hobhouse's Case*, 1820, 3 Barn. & Ald. 420; 22 R. R. 443; see also the article HABEAS CORPUS).

A *mandamus*, said Lord Mansfield, C.J., in a judgment in the Court of King's Bench, is certainly a prerogative writ flowing from the King himself sitting in this Court, superintending the police, and preserving the peace of this country, and will be granted wherever a man is entitled to an office or a function, and there is no other adequate legal remedy for it (*R. v. Barker*, 1762, 1 Black. (W.), at p. 352). And in a more recent case it was pointed out that a writ of *mandamus* is a prerogative writ, and not a writ of right, and it is in this sense in the discretion of the Court whether it shall be granted or not (*per* Lord Chelmsford, *R. v. The Churchwardens of All Saints, Wigan*, 1876, 1 App. Cas. (H. L.), at p. 620; see also MANDAMUS).

By the prerogative writ of *prohibition* the assumption of powers by an inferior Court in excess of its jurisdiction is restrained. The writ may issue whenever an inferior Court, whether ecclesiastical or temporal, acts without jurisdiction or in excess of jurisdiction, and requires the proceedings in the inferior Court to be stayed or peremptorily stopped (see Blackstone, *Com.*, bk. iii. p. 112; Fitz-Herbert, *Natura Brevium*, p. 40; see also the article PROHIBITION).

The writ of *certiorari* is issued, upon cause shown, to remove civil or criminal proceedings from an inferior Court to the High Court. The Crown is, however, entitled to a writ of *certiorari* as a matter of right and as of course (see Bacon, *Abr.*, tit. "Certiorari;" Blackstone, *Com.*, bk. iv. p. 315; Fitz-Herbert, *Natura Brevium*, p. 242; see also the article CERTIORARI).

The purpose of the writ of *procedendo* is to compel an inferior Court to proceed to judgment in the case of delay, and also where a cause has been removed from an inferior Court by *habeas corpus* or *certiorari* on insufficient grounds, the proceedings may, by writ of *procedendo*, be sent back to the inferior Court for trial (see Blackstone, *Com.*, bk. iii. p. 109; Fitz-Herbert, *Natura Brevium*, p. 153; see also *R. v. Scaife*, 1852, 18 Q. B. 773; and the article PROCEDENDO).

The ancient writ of *quo warranto* was a high prerogative writ in the nature of a writ of right for the King against one who usurped or claimed any office, franchise, or liberty of the Crown to inquire by what authority he supported his claim in order to determine the right (see High, Extraordinary Legal Remedies (s. 592)). Procedure by information in the nature of a *quo warranto* has for a long time past taken the place of the ancient writ (see QUO WARRANTO).

The writ of *ne exeat regno* also was a prerogative writ, which formerly issued to restrain a person from leaving the kingdom; in its original use it was confined to political or State purposes (see Bacon, *Abr.*, tit. "Prerogative," C. 3; Fitz-Herbert, *Natura Brevium*, p. 85). The writ of *ne exeat regno* was subsequently resorted to in the Court of Chancery. In *Whitehouse v. Partridge*, 1818, 3 Swans., at pp. 378, 379; 36 E. R. 896; 19 R. R. 216, Lord Eldon, L.C., stated that the application of the high prerogative writ of *ne exeat regno* would not be extended, it having been already extended far enough. Under the present practice the writ is not issued except in cases which come within the provisions of the Debtors Act, 1869, s. 6 (see *Drover v. Beyer*, 1879, 13 Ch. D. 242; see also NE EXEAT REGNO).

The prerogative writs *habeas corpus*, *certiorari*, *prohibition*, *mandamus*, etc., do not issue as of mere course, without showing some probable cause why the extraordinary power of the Crown should be called to the party's assistance (see Blackstone, *Com.*, bk. iii. p. 132), and are to be distinguished from original writs which are the commencement of suits between party and party (see, *per* Lord Mansfield, C.J., *R. v. Cowle*, 1759, 2 Burr., at p. 855).

The term "high prerogative writ" was applied to those writs which issued at the discretion of the Crown, acting through the Court of King's Bench, in which, in legal theory, the Sovereign was personally present, and in some cases through the other superior Courts. The discretion was and is exercised, not arbitrarily, but upon fixed legal principles; and with regard to this, it has been said that upon a prerogative writ there may arise many matters of discretion which may induce the judges to withhold the grant of it, matters connected with delay, or possibly with the conduct of the parties; and when the judges have exercised their discretion in directing that which is in itself lawful to be done, no other Court can question their discretion in so directing; but with regard to that which is in itself not lawful to be done, they are open to correction, as every other Court is, by the Court of Appeal or by a higher authority (see, *per* Lord Hatherley, *R. v. The Churchwardens of All Saints, Wigan*, 1876, 1 App. Cas. (H. L.), at p. 622).

Further information as to the scope of the prerogative writs and the procedure for obtaining them will be found under their various heads. See CERTIORARI; HABEAS CORPUS; MANDAMUS; QUO WARRANTO; PROCEDENDO; PROHIBITION.

Presbyterian.—See NONCONFORMIST.

Prescribed.—Sec. 2 of the Markets and Fairs Act, 1847, provides that “the word ‘prescribed’ used in this Act in reference to any matter herein stated shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if instead of the word ‘prescribed’ the expression ‘prescribed for that purpose in the special Act’ had been used.”

Prescribed Limits.—These words in sec. 13 of the Markets Clauses and Fairs Act, 1847, mean the boundaries of the borough to which the local Act relates, and not the limits of the market (*Caswell v. Cook*, 1862, 31 L. J. M. C. 185; see also *Llandaff and Canton Districts Market Co. v. Lyndon*, 1860, 6 Jur. N. S. 1344).

Prescription.

TABLE OF CONTENTS.

I. WHAT PRESCRIPTION IS . . .	457	can Rights be acquired by Prescription . . .	460
II. PRESCRIPTION AT COMMON LAW . . .	458	(e) What Kind of Enjoy- ment is required to establish a Right by Prescription . . .	460
(a) What Rights may be acquired by Prescrip- tion	458		
(b) Time of Prescription . . .	458	III. PRESCRIPTION UNDER THE PRE- SCRIPTION ACT, 1832 . . .	460
(c) What Persons can acquire Rights by Prescrip- tion	459	IV. HOW MAY PRESCRIPTIVE RIGHTS BE LOST	464
(d) Against what Persons			

I. WHAT PRESCRIPTION IS.

Where a person acquires a right to an incorporeal hereditament through long user by himself and those under whom he claims, and there is no known origin of the right, he is said to acquire the right by prescription. Prescription is one of the processes by which lapse of time confers a right. The effect of lapse of time in barring legal rights of action, and in extinguishing rights to real property, depends entirely on the different Statutes of Limitation; these statutes, which have been already discussed (see article LIMITATIONS, STATUTES OF), in so far as they apply to land, act indirectly so as to confer rights, because as a title is only lost by dispossession, the statutes in extinguishing one title to land indirectly confer another; those Statutes of Limitation which do not refer to land have a purely negative effect, and do not confer rights. The Statutes of Limitation do not affect rights to incorporeal hereditaments, except those tithes which do not belong to a spiritual or eleemosynary corporation sole, and hereditaments, like rent and annuities, charged upon land. The effect of the lapse of time in conferring rights to incorporeal hereditaments depends upon prescription, of which there are two kinds—prescription at the common law and prescription under the Prescription Act—prescription differing from limitation in this respect, that while there is no limitation except what is laid down by statute, only a part of the subject-matter of prescription is governed by statute.

II. PRESCRIPTION AT COMMON LAW.

(a) *What Rights may be acquired by Prescription.*—Prescription is often loosely used to express the effect of lapse of time in conferring any right or title, but the word, properly used, only applies to the acquisition of a personal right to incorporeal hereditaments. A title to land may be acquired by the operation of a Statute of Limitation, but cannot be acquired by prescription (*Wilkinson v. Proud*, 1843, 11 Mee. & W. 33; 63 R. R. 507). All cases of prescription at common law imply a grant, and therefore no right can be acquired by prescription except a right which can be the subject of a grant. Thus a right claimed by an owner of land to an uninterrupted flow of air (*Bryant v. Lefever*, 1879, 4 C. P. D. 172), or to an uninterrupted prospect (*A.-G. v. Doughty*, 1752, 2 Ves. Sen. 453; 28 E. R. 290), over adjacent property, or to the flow of underground water (*Chasemore v. Richards*, 1859, 7 H. L. 349; 11 E. R. 140), cannot be the subject of a grant, and cannot be acquired by prescription. [On the question of air, however, it has recently been held by Neville, J., that a right to the access of air to a defined aperture may be acquired, though the air do not flow through a defined channel over the servient tenement. "There is no distinction between the acquisition of a right to light and of a right to air" (*Cable v. Bryant*, [1908] 1 Ch. 259, 262; see also the cases there cited, and *Chastey v. Ackland*, [1895] 2 Ch. 155, which was settled after argument in the House of Lords, [1897] A. C. 155). See the cases collected in Carson's *Real Property Statutes*, 1902, p. 107. See AIR, Vol. I. p. 291.] So prescription cannot confer a right which is against the public benefit, *e.g.* a right to obstruct a highway (*James v. Hayward*, 1631, Sir W. Jones, 222), or to do anything else which is a public nuisance, or to do something which is against the common law or a statute; a prescription, too, in order to be good, must be certain (Com. Dig., "Prescription," 97), and reasonable (see *Bryant v. Foot*, 1868, L. R. 3 Q. B. 497), and must not be contrary to another prescription (Vin. Abr., "Prescription," 99). [*Cp.* on the question of being reasonable and not inconsistent with the general principles of the common law, *Johnson v. Clark*, [1908] 1 Ch. 303.] But a claim by prescription is good *prima facie* if it might possibly have a legal commencement (Com. Dig., "Prescription," 95; [*Mercer v. Denne*, [1904] 2 Ch. 534, 557; *s.c.* 1905, 2 Ch. 534]). As to what things can and what cannot be prescribed for, see Co. Litt. 114a; Herbert's *History of the Law of Prescription in England*, 88; Vin. Abr., "Prescription," C. & D.

(b) *Time of Prescription.*—Originally the time necessary to establish a title by prescription was time "whereof the memory of man runneth not to the contrary." By analogy to the period of limitation for a writ of right, the commencement of legal memory was ultimately fixed at 1189, the first year of the reign of Richard I. (Co. Litt. 113a). In practice, an enjoyment as of right for twenty years was regarded as proof of user from the time of the commencement of legal memory, but such proof might be rebutted if it were shown that the right claimed could not possibly have existed from that period; a common mode of defeating such a right was by proving unity of possession of the dominant and servient tenements since 1189 (*per* Martin, B., *Mounsey v. Ismay*, 1865, 34 L. J. Ex. 55). To meet such cases the Courts resorted to the fiction of a lost modern grant, and where user for twenty years was proved, juries were directed to find that the right in question had been the subject of a grant, but that the grant was lost. This period of twenty years

was fixed by analogy to the period required by the old Statute of Limitations, 21 Jac. I. c. 16 (see *Angus v. Dalton*, 1878, 4 Q. B. D. 162; 6 App. Cas. 740).

(c) *What Persons can acquire Rights by Prescription.*—It is of the essence of the doctrine of prescription that the prescription must be attached to something of a continuing nature. Therefore a prescription must be made either in the name of a person and his ancestors, or of a person and those whose estate he hath, or of a corporation and their predecessors (Co. Litt. 113b).

Rights in Gross.—The prescription in the name of a person and his ancestors, or of a corporation and their predecessors, relates to rights in gross; such claims are comparatively rare; but see *Welcome v. Upton*, 1840, 6 Mee. & W. 536; 52 R. R. 762, 767, for an instance of the successful assertion of a right of pasturage in gross in the case of an individual, and *Johnson v. Barnes*, 1872, L. R. 7 C. P. 592; 8 C. P. 527, for a similar instance in the case of a corporation. But prescription can confer no such right on an indeterminate body such as the inhabitants of a place who are unable to take by grant, and are therefore unable to prescribe. A fleeting body like the inhabitants of a place may, however, claim by custom certain rights, namely, certain easements over the soil of another, e.g. a right of way, or a right to play games in a field, but a right to take a *profit à prendre in alieno solo* cannot be gained by custom, except by copyhold tenants claiming against the lord (*Gateward's Case*, 1607, 6 Rep. 59b; 77 E. R. 344; *Blewett v. Tregonning*, 1835, 3 Ad. & E. 554; 42 R. R. 463). [Thus a custom for fishermen, inhabitants of a parish, to dry their nets on the land of a private owner, has been upheld (*Mercer v. Denne*, [1905] 2 Ch. 534). So also a claim by prescription, for the freeholders of a manor, to a free fishery in a river within the limits of a manor, though in the nature of a *profit à prendre*. For the Court may presume such a grant from the lord to an individual in common with other freeholders within the manor, accompanying each original grant of a freehold (*Chesterfield v. Harris*, [1908] 1 Ch. 230). A right claimed by the inhabitants of a township to take water from a well on the land of a private owner, and for domestic purposes, has been upheld as being an easement and not a *profit à prendre* (*Race v. Ward*, 1855, 24 L. J. Q. B. 153).] The difference between custom and prescription is explained in Co. Litt. 113b: a prescription is personal, and can only be made in the name of a person or a corporation; a custom is local, and is "alleged in no person, but within some manor or place."

Prescription in a que estate.—The commonest form of prescription is that which is laid in a person and those whose estate he has, which is called a prescription in a *que estate*. No person who has an estate less than an estate in fee can prescribe in a *que estate*, as an estate in fee is the only estate which has a continuance. Enjoyment of a right by a lessor, or by a person having a less right than that of a tenant in fee, could not be evidence of enjoyment from the commencement of legal memory, although it might be evidence of a modern lost grant (see *Bright v. Walker*, 1834, 1 C. M. & R. 211; 40 R. R. 536; [*Damper v. Basset*, [1901] 2 Ch. 350]). Tenants at will, or tenants for years, who wish to claim a right by prescription, can only do so by claiming it in the name of the tenant in fee (see Herbert on *Prescription*, p. 70). Copyholders are in a different position: they cannot prescribe against the lord, as they are only tenants at will, but they can claim a *profit à prendre* or other easement by the custom of the manor (Co. Litt. 113b).

(d) *Against what Persons can Rights be acquired.*—A claim by prescription from the commencement of legal memory must bind the fee, or else it will bind nobody (see *Bright v. Walker*, 1834, 1 C. M. & R. 211; 40 R. R. 536). It does not appear that anyone but the owner in fee can be bound by prescription in its proper sense; but see Herbert on *Prescription*, 80. At common law prescription did not run against the Crown, but by the 18 Edw. I. *Stat. de Quo War.*, prescription was made to run against the Crown.

(e) *What Kind of Enjoyment is required to Establish a Right by Prescription.*—To establish a right by prescription the enjoyment must be uninterrupted, open, continuous, and peaceable. A user which is neither preventable nor actionable cannot establish a right by prescription. The “consent or the acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses; an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence” (*Sturges v. Bridgman*, 1879, 11 Ch. D., at p. 863; [cp. *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557]).

III. THE PRESCRIPTION ACT, 1832, 2 & 3 WILL. IV. C. 71.

The Prescription Act is entitled “An Act to shorten the time of prescription in certain cases.” It is supplementary to the common law, does not cover the whole field of prescription, and only applies to some of the rights which could be acquired by common law; doubts have been expressed as to whether the Act applies to rights in gross (see *Welcome v. Upton*, 1840, 6 Mee. & W. 536; 52 R. R. 767); it certainly does not apply to *profits à prendre* in gross (*Shuttleworth v. Le Fleming*, 1865, 19 C. B. N. S. 687; 34 L. J. C. P. 309). [In *Mercer v. Denne*, [1905] 2 Ch. 574, 575, it was contended in argument that *Shuttleworth v. Le Fleming*, *supra*, was wrongly decided on this point, and inconsistent with *Dalton v. Angus*, 1881, 6 App. Cas. 740, 798. But in the view taken by the C. A. it was unnecessary to decide the point. See, however, *per Cozens-Hardy, L.J.*, at p. 586.] The scheme of the Act seems intended to be confined to easements properly so called, *i.e.* to easements exercised by the occupier of a dominant tenement over a servient tenement; see sec. 5, which provides that in pleading under the Act it shall be sufficient to allege the enjoyment of the right “by the occupiers of the tenement *in respect whereof the same is claimed*,” language which is only applicable to the case of a dominant and a servient tenement. As regards the easements to which the Act does apply, it takes away no right already existing, but only gives a new mode of asserting rights which could have been acquired before the Act by common law; such rights may still be claimed both under the Act and under the common law, either by enjoyment from the commencement of legal memory or by virtue of a lost grant (*Aynsley v. Glover*, 1875, L. R. 10 Ch. 283) [see this case and *Hyman v. Van Den Bergh*, cited *infra*, p. 463].

The first section of the Act relates to rights of common and other

profits or benefits "to be taken or enjoyed from or upon any land" whatever, including the land of the Crown and of the Duchies of Lancaster and Cornwall, and of any ecclesiastical person; matters and things which are specially provided for in the other sections of the Act, and tithes, rent, and services are excepted from this section. The section only relates to such claims as may be lawfully made at the common law by custom, prescription, or grant; custom as here used is limited to the custom of a manor by which copyholders can claim a *profit à prendre* against their lord, for, as we have already pointed out, no other claim by custom to a *profit à prendre* is valid in law. The section enacts that if any such right of common or other profit or benefit to be taken and enjoyed from or upon any land has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, it shall not be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but that such claim may be defeated in any other way by which the same was liable to be defeated at the time when the Act was passed; when such right, profit, or benefit has been so taken and enjoyed for the full period of sixty years, the right shall be deemed absolute and indefeasible, "unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

To establish a right under this section it is only necessary to show that the benefit claimed has been enjoyed without interruption by the claimant for the required period as of right and not by permission, and that the right claimed is one that could have a legal origin by custom, prescription, or grant, and it is immaterial on what ground the claimant rested his alleged right (*Earl de la Warr v. Miles*, 1881, 17 Ch. D. 535). But the user under the Act must be without interruption, and must be such as could be interrupted by someone capable of resisting the claim, and also it must be of right; if no one could interrupt it, and the enjoyment is not of right, the statute does not apply (*Arkwright v. Gell*, 1839, 5 Mee. & W. 203; 52 R. R. 671). The right, to be valid, must be appurtenant to some hereditament, and must be connected with the hereditament and with the enjoyment of it; a right claimed by the owner of one tenement to enter on the close of another and to take away trees generally is bad (*Bailey v. Stevens*, 1862, 31 L. J. C. P. 226). An actual enjoyment in fact for more than the statutory period cannot be an enjoyment as of right, if during such period the person that enjoys the benefit knows that it is only permitted so long as some particular purpose is being served; nor does the Act apply to the owner of a servient tenement who enjoys some benefit from the exercise of the easement by the owner of the dominant tenement; the owner of a servient tenement cannot by such enjoyment acquire any right to compel the owner of the dominant tenement to exercise the easement, for the easement only exists for the benefit of the dominant tenement (*Mason v. Shrewsbury and Hereford Rly. Co.*, 1871, L. R. 6 Q. B. 578).

The second section of the Act relates to claims "to any way or other easement, or to any watercourse or the use of any water." This section is similar in its terms to the first section, except that the periods of prescription are twenty years for a claim that may be defeated, and forty years for an indefeasible claim; the same principles apply to the second section as to the first. ["The words 'claiming right thereto' in sec. 2, and the equivalent words 'as of right,' which occur in sec. 5, have the

same meaning as the older expression *nec vi, nec clam, nec precario*. A temporary permission, although often renewed, would prevent an enjoyment from being 'as of right;' but a permanent irrevocable permission attributable to a lost grant would not have the same effect" (*per* Lord Lindley in *Gardner v. Hodgson's Brewery Co.*, [1903] A. C. 239). Therefore if enjoyment has been equally consistent with two reasonable inferences, enjoyment as of right is not established (*l.c.*). So under this section a right of way cannot be acquired by a tenant over land occupied by another tenant under the same landlord, even though the user has existed for the period of forty years (*Kilgour v. Gaddes*, [1904] 1 K. B. 457.) It is not clear what easements, other than rights of way or rights to a watercourse or the use of water, are included within this section. In *Webb v. Bird*, 1831, 30 L. J. C. P. 384, in deciding that the section did not apply to a right to the passage of air, Erle, C.J., and Byles, J., expressed an opinion that the words or "other easement" should be construed as something *ejusdem generis* with the right of way; it is clear that the generality of the words must be limited in some way, and must exclude the easements provided for in the first and the third sections of the Act; it has been decided that an easement of light is governed entirely by the third section of the Act, and does not come within the general words of sec. 2 (*Perry v. Eames*, [1891] 1 Ch. 658); Lord Selborne, in *Angus v. Dalton*, 1881, 6 App. Cas., at p. 798, gave a wider meaning to the words "other easement," and held that it applied to the right of lateral support which one building acquires by lapse of time from the adjacent soil. [*Cp. Simpson v. Godmanchester*, [1897] A. C. 696, where a right to open locks was held to be within the section, and Lord Davey considered that it included easements of every description, notwithstanding the contrary opinion expressed by Erle, C.J., in *Webb v. Bird*, *supra*; *ib.*, p. 709. See Carson, p. 7.]

The third section, which only applies to rights of light, is different in its terms from the first two sections. [See as to the nature of the right acquired at common law, and under the Act, LIGHT, Vol. VIII. pp. 289, 290, citing *Morgan v. Fear*, [1907] A. C. 425, and add the subsequent case of *Richardson v. Graham*, [1908] 1 K. B. 39.] The third section provides that "where the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." The Crown is not named in this section, and therefore is not bound by its provisions (*Perry v. Eames*, [1891] 1 Ch. 658).

The fourth section determines how the periods of prescription are to be reckoned. "Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question." The section also provides that no act or other matter is to be deemed to be an interruption within the meaning of the statute, "unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the persons making or authorising the same to be made."

[Secs. 3 and 4 must be read in conjunction. Consequently a period of twenty years' enjoyment of the access and use of light to a building does not create an absolute and indefeasible right immediately on the expiration of the period of twenty years (*Hyman v. Van Den Bergh*, [1908] 1 Ch. 167, when the Court of Appeal adopted the dictum of Lord Macnaghten in *Colls v. Home and Colonial Stores*, [1904] A. C. 179, 189, explaining *Tapling v. Jones*, 11 H. L. C. 290). Unless or until the claim is made and the writ issued the right acquired is only inchoate, and however long the enjoyment may have been the right and the origin of the right is the same as if the Act had never been passed. To satisfy the requirements of the statute the period must be one "immediately previous to and terminating in some action or suit in which the right shall be or shall have been brought into question" (*per Fletcher Moulton, L.J., l.c.*, p. 173).

It seems that the effect of the Act has been that it has "made straight the path of the owner of the dominant tenement by putting him to prove actual enjoyment for twenty years only and dispensing with all questions of right and of the title to the servient tenement, but it gave to the latter two defences—(1) The agreement mentioned in sec. 3; and (2) the obstruction, etc., mentioned in sec. 4. In cases in which either of these defences is applicable, the plaintiff cannot evade the Act by setting up any mode of claim other than that conferred on him by the statute" (*per Farwell, L.J., in Hyman v. Van Den Bergh*, [1908] 1 Ch. 176).

In cases in which there is no express defence provided by the Act for the servient tenement, *e.g.* in the case of interruption by unity of possession only, the right may still be claimed at common law independently of the Act (*Aynsley v. Glover*, 1875, L. R. 10 Ch. 283, explained in *Hyman v. Van Den Bergh, supra*).

The "consent or agreement" mentioned in sec. 3 may, it seems, be given by the tenant in occupation of the dominant tenement, just as the tenant of the servient tenement can by his acquiescence allow the creation of the easement over his landlord's land (*l.c.*.)]

The fifth section relates to pleading, and provides that where, before the Act, the party claiming could by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation should still be deemed sufficient, and that, when a right is claimed in such a form, evidence might be given to establish a right under the Act; also that, where before the Act it would have been necessary to allege the right to have existed from time immemorial, it should be sufficient to allege the enjoyment thereof as of right by the occupier of the tenement in respect whereof the same is claimed for, and during such of the periods mentioned in the Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee; if the other party intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter not inconsistent with the simple fact of enjoyment, such proviso, etc., must be specially alleged. It is often advisable in claiming a prescription to claim it both under common law and under the Act. Indeed it is every-day practice to plead (1) enjoyment of the right claimed (a) for twenty or thirty years, as the case may be, (b) for forty or sixty years, (c) from time immemorial; (2) lost grant (see *Aynsley v. Glover*, 1875, L. R. 10 Ch. 283). [See this case explained in *Hyman v. Van Den Bergh, supra*. The Court will probably not allow an amendment, at anyrate late in the

proceedings (*Smith v. Baxter*, [1900] 2 Ch. 138, 147; *Hyman v. Van Den Bergh*, [1908] 1 Ch. 171, 178).]

The sixth section provides that no presumption shall be allowed in favour of any claim on proof of the exercise of the right claimed for any less period of time than the period mentioned in the Act as applicable to such claim.

The seventh section relates to cases of disabilities and tenancies for life, and enacts that the time during which any person, otherwise capable of resisting any claim to any of the matters mentioned, shall have been an infant, idiot, *non compos mentis*, feme covert, or tenant for life, or during which any action or suit shall have been pending and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods mentioned, except where the right or claim is declared by the Act to be absolute and indefeasible. Feme covert should now be excepted from this section, as the effect of the Married Women's Property Act, 1882, is to render married women discover for the purposes of bringing actions (see *Lowe v. Fox*, 1885, 15 Q. B. D. 667; *Weldon v. Neal*, 1884, 51 L. T. 289).

The eighth section relates only to easements mentioned in the second section, and provides that where any land or water upon, over, or from which any way or watercourse or use of water shall have been enjoyed or derived has been held under any term of life or any term of years exceeding three years from the granting thereof, the time of enjoyment of such way, etc., shall be excluded in the computation of the period of forty years, in case the claim shall within three years after the end of such term be resisted by any person entitled to any reversion expectant on the determination thereof. The effect of this section has been considered in *Bright v. Walker*, 1834, 1 C. M. & R. 211; 40 R. R. 536, where it was held that, if land was let on a lease for life, no right of way could be acquired during the pendency of the lease against the owner in fee, and that a user which did not give a valid right against the owner in fee gave no right against the lessee or anyone.

IV. HOW MAY PRESCRIPTIVE RIGHTS BE LOST.

Prescriptive rights may be extinguished by Act of Parliament, or by operation of law, or by the act of the owner. A prescriptive right is extinguished by the operation of law when the dominant and servient tenements come into the possession of the same owner in fee (see *James v. Plant*, 1836, 4 Ad. & E. 761; 43 R. R. 465). [But unity of seisin, without unity of possession, will not extinguish an easement of light (*Richardson v. Graham*, [1908] 1 K. B. 39, where the earlier cases are discussed).] An easement of necessity ceases by operation of law when the necessity ceases (*Holmes v. Goring*, 1824, 2 Bing. 76; 27 R. R. 549). A prescriptive right may also be destroyed by such a substantial alteration in the dominant tenement as will create a substantial variance in the mode or extent of the user, and will throw a greater burden on the servient tenement (see *Harvey v. Walters*, 1873, L. R. 8 C. P. 166; [ep. *Milner's Safe Co. v. Great Northern and City Rly.*, [1907] 1 Ch. 208]). But no alteration in the dominant tenement will destroy the easement unless there is such a substantial alteration (*Scott v. Pape*, 1886, 31 Ch. D. 554). A prescriptive right may also be destroyed by express release, or

by such an abandonment of the right as would justify a jury in presuming a release (*Lowell v. Smith*, 1857, 3 C. B. N. S. 127).

[*Authorities.*—Gale on *Easements*; Goddard on *Easements*; Herbert's *History of the Law of Prescription in England*; Carson's *Real Property Statutes*; Carson's *Prescription and Custom*.]

Present.—A request to a tradesman to show the defendant's house, and the defendant would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the work and labour bestowed in that service (*Jewry v. Busk*, 1814, 5 Taun. 302). But a request by a testator that a handsome gratuity should be given to each of his executors is void for uncertainty (*Jubber v. Jubber*, 1839, 9 Sim. 503; 59 E. R. 452; 47 R. R. 291).

Presentation.—Presentation is the formal nomination by a patron (or owner of the advowson) of a benefice to the bishop of the diocese of the person whom he proposes as incumbent for a vacant benefice, preparatory to the admission thereto of the nominee by *institution* by the bishop. When the bishop is himself the patron, there is no *presentation*, and the act of admission to the benefice is termed *collation*. Formerly, in the case of donative advowsons, no presentation was necessary, the nominee being put in possession by the patron. But donatives have now been abolished by the Benefices Act, 1898 (see under ADVOWSONS).

If the patron desires to appoint himself he can do so, though he does not in that case, strictly speaking, *present* himself, but asks the bishop to admit him, and the bishop is bound to accept him as presentee (*Walsh v. Bishop of Lincoln*, 1875, L. R. 10 C. P. 518), except for such sufficient cause as may be allowed by law. Increased (and very salutary) powers in this respect were given to the bishops by the Benefices Act, 1898, 61 & 62 Vict. c. 48, as will be explained presently.

The exercise of the powers of a patron, by various personages, may be thus distinguished:—

1. *Coparceners.*—Apart from agreement, the eldest sister has the right to the first turn, the second sister to the second turn, and so on.

2. *The Crown.*—Upon appointment to an English bishopric (*R. v. Provost of Eton*, 1857, 8 El. & Bl. 610) the Crown has the prerogative right of presenting to a benefice vacated by the new bishop. When there are several persons entitled to patronage rights, such as coparceners, the prerogative presentation does not alter their relative rights at all. The Crown is also entitled to exercise the patronage of a bishop during the vacancy of the see (*Mirehouse v. Rennell*, 1825, 7 Barn. & Cress. 113; 8 Bing. 490; 1 Cl. & Fin. 527; 6 E. R. 1015; 36 R. R. 139).

3. *Trustees and Executors.*—When the legal estate of an advowson is in a trustee, so that the right of patronage is in the *cestui que trust*, the latter nominates the clerk chosen to the legal patron, who presents him to the bishop. On the death intestate of a patron, the right to present to a vacant benefice passes to his executors, though the advowson descends to his heir.

4. *Infants.*—An infant, however young, can present or nominate a clerk. The selection of the person to be presented is in the guardian if the infant is patron, or *semble*, in the trustees if the infant is a *cestui que trust*.

5. *Joint Tenants and Tenants in Common.*—If the joint tenants are

trustees the majority may present, and the bishop may act on their presentation. If he declines to do so, the minority (having had opportunity of urging their views) may be compelled to join in the presentation, so as to give effect to the right of the majority (*A.-G. v. Scott*, 1749, Amb. 81; 1 Ves. 413; 27 E. R. 1113). If, however, joint tenants or tenants in common are beneficially interested, then, if they cannot agree, it has been held that each is entitled to his chance of the presentation by drawing lots (*Johnstone v. Baber*, 1856, 6 De G. M. & G. 439; 43 E. R. 1304). It is said that if joint tenants each present a clerk to the bishop, the bishop may choose which he will. Joint tenants who are beneficially entitled may present one of themselves if they think fit. By 7 Anne, c. 18, s. 2, joint tenants and tenants in common may obtain rights of presentation in turn by a partition.

6. *Lunatics*.—The Lord Chancellor exercises the right of presentation where the patron is a lunatic so found by inquisition; and it is presumed that (under the Lunacy Act, 1890) the same rule holds where the person, though insane, has not been so found by inquisition.

7. *Married Woman*.—Under the old law, where a married woman was entitled, the practice was for the husband to join with her in a presentation. The point whether he should do so now does not seem to have arisen since the Married Women's Property Act, 1882.

8. *Mortgagee*.—Though the right of presentation is in the mortgagee, he must present the nominee of the mortgagor if a vacancy occurs before foreclosure, even (it seems) though there is a covenant in the mortgage deed that the mortgagee is to present (*Jory v. Cox*, Prec. Ch. 71; *Amhurst v. Dowling*, 2 Vern. 401).

9. *Papists*.—By 13 Anne, c. 13, s. 1, no papist can present to any benefice, and the Universities of Oxford and Cambridge shall have the right to present instead of him (see *Boyer v. Bishop of Norwich*, [1892] P. 41; A. C. 417). For the areas within which the two universities respectively present, see Blunt and Phillimore's *Book of Church Law*.

10. *Parishioners*.—Where a right of presentation is in parishioners the mode of election is regulated by custom (see *Shaw v. Thompson*, 1876, 3 Ch. D. 233; where the custom had been for the vestry to lay down rules for carrying out the election). The Act 19 & 20 Vict. c. 50 provides for the sale of advowsons vested in, or in trustees for, parishioners, ratepayers, freeholders, or the like.

11. *Patrons having Alternate Turns*.—As already mentioned, a prerogative turn by the Crown does not count. If one patron usurps the other's turn, and the six months (LAPSE) run out, the other has lost his turn, and cannot usurp the next turn by way of retaliation (*Keen v. Denny*, [1894] 3 Ch. 169).

The presentation should be in writing. Stamp duty was formerly payable on such an instrument, but was abolished by 40 & 41 Vict. c. 13.

A presentation by a lay patron may be revoked at any time before institution (1 Phillimore, 315).

It is not lawful to bargain for any valuable consideration for presenting a particular person (SIMONY). Under certain circumstances, however, a presentation may be made upon condition that the presentee will resign when called upon (see further under RESIGNATION BONDS).

Upon presentation, the bishop is to institute the person presented within twenty-eight days (Canon 95), provided he is fit, *idoneus*; and previously to the Benefices Act, 1898, 61 & 62 Vict. c. 48, the only grounds

upon which the bishop might refuse to institute were stated as *Ætas, scientia, mores, et ordo* (see Lindwood, p. 139, 1679 ed.).

1. *Ætas and Ordo*.—The person instituted must be in priest's orders (14 Car. II. c. 4, s. 10), that is, of the age of twenty-four. He is usually required to produce his letters of orders and his letters missive or testimonials countersigned by his former bishop, but he cannot be compelled to do so (*Bishop of Exeter v. Marshall*, 1866, L. R. 3 H. L. 17).

2. *Mores*.—Any fact which would be just cause of deprivation, whether on moral grounds or by reason of doctrine or ritual, is a just cause for refusal to institute (*Heywood v. Bishop of Manchester*, 1884, 12 Q. B. D. 404; INCUMBENT).

3. *Scientia*.—The bishop may examine the presentee as to his learning (*semble*, by written question and answer), and if he finds him not sufficiently learned, may reject him on that ground (*Willis v. Bishop of Oxford*, 1877, 2 P. D. 192). In the Welsh dioceses of St. Asaph, Bangor, Llandaff, and St. Davids, it is specially provided by sec. 104 of the Pluralities Act, 1838, that the bishop may reject a presentee on the ground of his ignorance of Welsh (see *Abergavenny v. Bishop of Llandaff*, 1888, 20 Q. B. D. 460).

But it is now provided by the Benefices Act, 1898, s. 2, that a bishop may refuse to admit a presentee if (i) at the date of the vacancy not more than one year has elapsed since a transfer of the right of patronage, unless it be proved that the transfer was not effected in view of the probability of a vacancy within such year; or (ii) on the grounds that not more than three years have elapsed since the presentee was ordained deacon; or (iii) that he is unfit for the discharge of the duties of the benefice by reason of physical or mental incapacity, pecuniary embarrassment, grave misconduct, or having been (with reference to the presentation) party to any transaction invalid under the Act. Further, a bishop shall not admit any person to a benefice until the expiration of one month after notice (which is to include particulars of preferment previously held) that he proposes to admit such person has been served on the churchwardens of the parish, who are to publish the notice.

Should the bishop refuse to admit a presentee on any ground specified in sec. 2 of the Act, or any other ground sufficient in law, not having reference to doctrine or ritual, he is to signify in writing his refusal, and the grounds thereof, to the patron and the presentee; whereupon either of them may within one month appeal to a Court consisting of the archbishop of the province (or, if it is the archbishop who refuses to admit, the archbishop of the other province) and a judge of the Supreme Court nominated by the Lord Chancellor. The judge alone is to decide all questions of law and fact, and if he find that there is no fact sufficient in law to constitute unfitness or disqualification in the presentee, the archbishop is to direct his admission to the benefice; but if he find such fact to exist, the archbishop is to decide whether under the circumstances the admission of the presentee should be refused: the judgment of the archbishop being final in either case.

The Act leaves untouched the old remedies available where a bishop refuses to admit a presentee on the ground of doctrine or ritual, namely, an action of *Quare impedit* in the High Court of Justice, which may be brought by the patron, and an action of *Duplex querela* by the presentee in the Ecclesiastical Courts.

The Act resolves an old doubt as to the right of a clerical patron, in case of refusal by the bishop to admit his presentee, by providing (s. 6)

that, if such refusal is upheld on appeal as above, the patron shall have the same right of further presentation as if he were a lay patron.

[*Authorities.*—Phillimore, *Ecclesiastical Law*; Gibson, *Codex*, tit. xxxiii. xxxiv., vol. i. p. 756, 1761 ed.; for form of presentation, see 1 Phillimore, 314; or Blunt and Phillimore's *Book of Church Law*.]

Presentment.—A term applied to an expression of the opinion of a grand jury to the Court for which it is summoned, relating to some matter which appears to the grand jury to be of public concern, based on the local knowledge of the jury.

It was of three kinds—(1) A presentment of the opinion of the jury in favour of a change in the law, *e.g.* of the imposition of whipping as a punishment for certain offences, or as to the frequency of nuisances or grievances in their district, such as that highways are out of repair (but see now 51 & 52 Vict. c. 41, s. 78 (3)). (2) A specific accusation against a named person for a particular crime made on their own knowledge without calling witnesses before them in accordance with the ordinary procedure as to indictments. Such a presentment is delivered to the Court by the clerk of the peace; and if the Court is competent to deal with it he puts the presentment into the form of an indictment and the procedure appropriate to a voluntary indictment is then followed. For the form of a presentment, see Archbold, *Quarter Sessions*, 6th ed., 132, 292. The distinction between presentment and indictment, as may be seen by the form of the latter, is very slight and of modern creation. Voluntary presentments are now very rarely made as to crimes. As to presentments by Commissioners of Sewers, see SEWER. (3) Under the old law as to highways until 1835 presentments by one or more justices on their own view or the view of the Surveyor of Highways were allowed in cases where a highway was out of repair. These presentments were abolished by sec. 99 of the Highway Act, 1835, 5 & 6 Will. iv. c. 50, and indictment by order of justices substituted (s. 95). (*R. v. Arnold*, 1857, 8 E. & B. 550). This procedure did not and does not affect the right of a grand jury to present by way of indictment a nuisance caused by non-repair of a highway. Under the old law of bridges, a single justice could present a county bridge for non-repair (*R. v. Brecon*, 1849, 15 Q. B. 813), and no expenditure could be incurred on such bridge without the presentment of a justice or a grand jury. The administrative franchises of justices with respect to county bridges have been transferred to county councils, and grand juries can now present the non-repair of a county bridge only by way of indictment (51 & 52 Vict. c. 41, s. 78 (3)). See also COPYHOLD.

Presentment of Bill.—See BILLS OF EXCHANGE, Vol. II. p. 209.

Presents.—A word in a deed signifying the deed itself, which is expressed by the phrase “these presents.” It is especially used in a deed-poll, which cannot be described as “this indenture.”

President of the Council.—See PRIVY COUNCIL.

Pressing Seamen.—See IMPRESSMENT.

Prest.—A duty which sheriffs formerly had to pay on receiving their tallies for the sums standing due from them in the accounts of

the Exchequer. It was abolished by 2 & 3 Edw. VI. c. 4, s. 5 (1548). See SHERIFF.

Prestation Money.—Money payable by archdeacons to bishops in consideration of their exercising a jurisdiction which was formerly the bishops' (see *Gooche v. Bishop of London*, 1731, 2 Stra. 879. See also ARCHDEACON).

Presumptions.—Presumptions are of three kinds—(1) Conclusive or absolute presumptions of law, or *presumptiones juris et de jure*; (2) rebuttable, or *prima facie* presumptions of law, or *presumptiones juris*; and (3) presumptions of fact, or *presumptiones facti* or *nature*.

(1) Conclusive presumptions are inferences which the law will not allow to be contradicted by evidence. Though they are often conveniently spoken of as presumptions, they are in their nature hardly distinguishable from rules of substantive law. Thus the well-known presumption that every sane person above the age of fourteen knows the law is so wide of the truth that it is more happily expressed by saying that a man cannot take the benefit of his ignorance of the law (see Austin, *Jurisprudence*, vol. ii. p. 171). Another common-law presumption is, that every sane man of the age of discretion is conclusively presumed to intend the natural and probable consequences of his own acts (*R. v. Dixon*, 1814, 3 M. & S. 15; 15 R. R. 381; *R. v. Sheppard*, 1810, Russ. & R. 169). See also AGE, PRESUMPTIONS AS TO.

At common law and by statute there are many conclusive presumptions with regard to the regularity of official documents and proceedings. At common law, it is presumed that writs issuing out of the High Court are duly issued and in a case in which the Court has jurisdiction, unless the contrary appears on the face of them. Similarly, it is presumed that warrants and proceedings of either House of Parliament are regular and duly executed (*Gosset v. Howard*, 1847, 10 Q. B. 411; 74 R. R. 363). And it is conclusively presumed that the records of the High Court and charters of the Crown have been correctly made (*Reed v. Jackson*, 1801, 1 East, 355; 6 R. R. 283; *Ludford v. Gretton*, 1576, Pl. Com. 490).

Examples of conclusive presumptions created by statute will be found in the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 48—with regard to fraudulent preferences; the Companies Act, 1862, 25 & 26 Vict. c. 89, ss. 18 and 192—Certificate of Incorporation conclusive evidence of incorporation of company; the Nonconformists Chapels Act, 1844, 7 & 8 Vict. c. 45, s. 2—right to teach certain religious doctrines conclusively presumed from usage; and the Prescription Act, 2 & 3 Will. IV. c. 71, ss. 1, 2, and 3—conclusive presumption of lost grant.

Deeds and wills thirty years old, and produced from the proper custody, need not be proved, as there is a conclusive presumption that the attesting witnesses are dead (*Doe v. Walley*, 1828, 8 Barn. & Cress. 22; *Doe v. Burdett*, 1835, 4 Ad. & E. 1, 19).

When a bill of exchange is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed (45 & 46 Vict. c. 61, s. 21).

Certain presumptions are absolute, unless rebutted by evidence of a particular kind. Thus an untrue defamatory statement is presumed conclusively to be malicious unless the occasion be shown to be privileged.

Evidence of any other kind will not rebut the presumption (*per* Le Blanc, J., *R. v. Creevey*, 1813, 1 M. & S. 282; 14 R. R. 427; *Clark v. Molyneux*, 1877, 3 Q. B. D. 237). So a certificate of the official receiver in bankruptcy that a composition or scheme has been duly accepted and approved is conclusive as to its validity, unless fraud be proved (53 & 54 Vict. c. 71, s. 3).

(2) Rebuttable presumptions of law are inferences which a jury or a judge of fact is bound to draw from particular evidence, unless and until they are rebutted by evidence or by some other presumptions. This may be illustrated by the presumptions of legitimacy.

Legitimacy.—A child born in wedlock is presumed to be legitimate, but this presumption may be rebutted by showing that there was no intercourse between the parents at the time when the child must have been begotten, or by evidence of the conduct of the parents pointing to the illegitimacy of the child (*Morris v. Davies*, 1837, 5 Cl. & Fin. 163; 7 E. R. 365; 67 R. R. 50; *Bosvile v. A.-G.*, 1887, 12 P. D. 177; *Burnaby v. Baillie*, 1889, 42 Ch. D. 282, 296; *Morris v. Davies*, 1837, 5 Cl. & Fin. 163; 7 E. R. 365; *Aylesford Peerage Case*, 1886, 11 App. Cas. 1; *The Poulett Peerage*, [1903] A. C. 395). A child born more than nine months after the husband and wife have been judicially separated is presumed to be illegitimate (see *Hetherington v. Hetherington*, 1887, 12 P. D. 112).

Marriage.—Where a man and woman are proved to have lived together as man and wife, there is a presumption that they are lawfully married; and where it is proved that a form of marriage has been gone through, it will (except in proceedings for bigamy or divorce) be presumed that the marriage was validly celebrated (*Piers v. Piers*, 1849, 2 H. L. C. 331; 9 E. R. 1118; *Sastry v. Sembecutty*, 1881, 6 App. Cas. 364; *Sichel v. Lambert*, 1864, 15 C. B. N. S. 781; *R. v. Griffin*, 1879, 14 Cox C. C. 308; 24 & 25 Vict. c. 100, s. 57; 20 & 21 Vict. c. 85, s. 33).

Innocence.—In civil as well as criminal proceedings every person is presumed innocent of crime till the contrary is proved (see Stephen, *Evidence*, art. 94; *Williams v. East India Co.*, 1802, 3 East, 192; 6 R. R. 589; *Middleton v. Barned*, 1849, 4 Ex. Rep. 241; *R. v. Twynning*, 1819, 2 Barn. & Ald. 386; 20 R. R. 480).

Married Women.—If a married woman commits a theft, or receives stolen goods, knowing them to be stolen, in the presence of her husband, she is presumed to have acted under his COERCION. It is uncertain how far this presumption applies to felonies in general. It does not apply to high treason or murder (see Stephen, *Digest of Criminal Law*, art. 30).

When husband and wife are cohabiting there is a presumption of fact that the wife has her husband's authority to pledge his credit for the ordinary and daily wants of the household (see *Debenham v. Mellon*, 1880, 6 A. C. 24; and S. C. 5 Q. B. D. 402, *per* Thesiger, L.J.).

Against Wrong-doers.—If a man by his own tortious act withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted—*omnia presumuntur contra spoliatores* (*Armory v. Delamire*, 1721, 1 Stra. 305; 1 S. L. C. 385; *Clunnes v. Pezzey*, 1807, 1 Camp. 8).

Destruction of ship's papers raises a strong presumption that the vessel or her cargo is liable to condemnation. In other European countries it appears that this presumption is conclusive (*The Hunter*, 1814, 1 Dods. Adm. Rep. 480, 486).

Restricted goods seized under the Customs Acts are presumed to be goods liable to, and unshipped without, payment of duty (39 & 40 Vict. c. 36, s. 178; and see *ibid.*, s. 180).

If a collision takes place between two vessels, one of which is proved to have been at anchor (*The Bothnia*, 1860, Lush. 52; 29 L. J. P. & M. 65), or in stays (*The Sea Nymph*, 1860, Lush. 23), the other vessel is presumed to be to blame. And if, of two colliding ships, one, without reasonable excuse, fails to render to the other such assistance as may be practicable, that one is presumed to have been to blame for the collision (57 & 58 Vict. c. 60, s. 422; *The Queen*, 1869, L. R. 2 Ad. & Ec. 354). And in case of collision between two ships, if one has infringed any of the collision regulations she is presumed to be in fault, unless the circumstances made departure from the regulations necessary (57 & 58 Vict. c. 60, s. 419), or the infringement of the regulations could not possibly have contributed to the collision (*The Duke of Buccleugh*, 15 P. D. 86; [1891] A. C. 310; and see Marsden on *Collisions*, 5th ed., 38-55).

Omnia præsumuntur rite esse acta.—It is presumed that every person who acts in a public office was duly appointed or authorised to do so (*McGahey v. Alston*, 1836, 2 Mee. & W. 206; *R. v. Roberts*, 1878, 14 Cox C. C. 101), and that the duties of those who fill public offices are performed with regularity (*R. v. Catesby*, 1824, 2 Barn. & Cress. 814; *R. v. Mainwaring*, 1857, 10 Cox C. C. 192). And by statute, a rate which appears by the rate book to have been duly made and allowed, will be presumed to have been duly made and published (32 & 33 Vict. c. 41, s. 18).

Regularity of Documents.—It is presumed—

(a) That a lost document was properly stamped (*Marine Investment Co. v. Haviside*, 1872, L. R. 5 H. L. 624).

(b) That a deed signed and attested was duly sealed and delivered (*In re Sandilands*, 1871, L. R. 6 C. P. 411).

(c) That a document was made on the day of which it bears date (*Morgan v. Whitmore*, 1852, 6 Ex. Rep. 716; *Patez v. Gossop*, 1847, 2 Ex. Rep. 191); and as to bills of exchange, see 45 & 46 Vict. c. 61, s. 13, and *Roberts v. Bethell*, 1852, 12 C. B. 778.

(d) That alterations, erasures, etc., in deeds, affidavits, and other documents, not being wills, were made before execution (*R. v. Gordon*, 1855, Dears. C. C. 586; *Doe de Tatum v. Catmore*, 1851, 16 Q. B. 745).

Wills.—There are the following legal presumptions in regard to the execution of wills:—

(a) That papers bound together and constituting the will as found at testator's death, were so bound together at the time of execution and attestation (*Rees v. Rees & Rees*, 1873, L. R. 3 P. & D. 84; *Marsh v. Marsh*, 1860, 1 Sw. & Tr. 528).

(b) That interlineations, alterations, and erasures in wills were made after execution (*Simmons v. Rudall*, 1851, 1 Sim. N. S. 115, 136; 61 E. R. 45; *Lushington v. Onslow*, 1848, 6 N. C. 183; *Cooper v. Bockett*, 1846, 4 Moo. P. C. C. 449; 13 E. R. 365; 59 R. R. 371).

(c) Where a will is shown to have been in the custody of a testator, and it is not found at his death, the presumption is that the testator himself destroyed it (*Sugden v. Lord St. Leonards*, 1876, per Sir J. Hannen, 1 P. D. 195; *Welch v. Phillips*, 1836, 1 Moo. P. C. C. 299; 12 E. R. 828; 43 R. R. 83; *Keen v. Keen*, 1873, L. R. 3 P. & M. 105).

(d) For presumptions as to the construction of wills, see WILL.

Bills of Exchange.—(a) Every party whose signature appears on a bill is presumed to have become a party thereto for value (45 & 46 Vict. c. 61, s. 30).

(b) Every holder is presumed to be a holder in due course. This presumption is lost when it is shown that the bill is affected with fraud; but arises again when it is shown that value has in good faith been given for the bill (*ibid.*).

(c) Indorsements are presumed to have been made in the order in which they stand (*ibid.*, s. 52 (5)).

(d) Except where an indorsement bears date after the maturity of the bill, every negotiation is presumed to have been effected before the bill was overdue (*ibid.*, s. 36 (4)).

(e) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed (*ibid.*, s. 21 (3)).

Landlord and Tenant.—Where a tenant holds over after the expiration of his term and pays rent, a new year-to-year tenancy is presumed (*Bishop v. Howard*, 1823, 2 Barn. & Cress. 100; 26 R. R. 291).

Prescription and Custom.—*Ex divinitate temporis omnia præsumuntur rite esse acta.*—Long and peaceable enjoyment of customs and of franchises and easements raises a presumption of law of a lost grant or other appropriate lawful origin (*R. v. Joliffe*, 1823, 2 Barn. & Cress. 54; 26 R. R. 264; *Goodman v. Mayor of Saltash*, 1882, 7 App. Cas. 633; *Dalton v. Angus*, 1881, 6 App. Cas. 740; *Tilbury v. Silva*, 1890, 45 Ch. D. 98); and see PRESCRIPTION; CUSTOM; EASEMENT; HIGHWAYS.

When a custom has been once proved to exist, its continued existence is presumed till the contrary is proved (*Scales v. Key*, 1840, 11 Ad. & E. 819; 52 R. R. 518).

Life and Death.—When a person has been proved to be alive at any time, there is a presumption of fact that he continues to live for some (indefinite) time afterwards (*R. v. Lumley*, 1869, L. R. 1 C. C. R. 196). But when a person goes abroad and is not heard of for seven years by those who would be likely to hear of him if living, there is a presumption of law that he is dead, but there is no presumption as to the time of his death (*Nepean v. Doe*, 1837, 2 Mee. & W. 894; 2 Sm. L. C. 542; *Re Phené's Trusts*, 1869, L. R. 5 Ch. 139; and see 18 & 19 Car. II. c. 11, s. 1, as to absence beyond seas for seven years of a *cestui que vie*; and 24 & 25 Vict. c. 100, s. 57, as to absence of husband or wife for seven years in cases of bigamy). [As to presumptive proof of death for purpose of obtaining probate or letters of administration, see DEATH, PROOF OF.]

Boundaries and Title.—(a) Where a road or stream bounds properties or parishes, the middle line of the road or stream is presumed to be the boundary (*R. v. Strand Board of Works*, 1863, 4 B. & S. 526; *Berridge v. Ward*, 1861, 10 C. B. N. S. 400; *R. v. Inhabitants of Landulph*, 1834, 1 Moo. & Rob. 393; *Lord v. Commissioners of Sydney*, 1859, 12 Moo. P. C. 473; 14 E. R. 991).

(b) The soil of unnavigable rivers and of highways is presumed to belong to the adjoining owners *usque ad medium filum* (*Carter v. Muscat*, 1768, 4 Burr. 2163; *Crossley v. Lightowler*, 1866, L. R. 3 Eq. 279; *Beckett v. Corporation of Leeds*, 1872, L. R. 7 Ch. 421).

(c) Where two adjacent fields are separated by a hedge and ditch, the hedge is presumed to belong to the owner of the field in which

the ditch is not (*per* Bayley, J., in *Guy v. West*, 1808, Sel. N. P. 1244).

(d) The Crown is presumed to own the foreshore as far as the medium line between high and low-water mark (*A.-G. v. Chambers*, 1854, 3 De G., M. & G. 206; 43 E. R. 486); above that line, the owner of the adjoining land (*Lowe v. Govett*, 1832, 3 Barn. & Adol. 862; 37 R. R. 560).

(e) The wastes of a manor are presumed to belong to the Lord of the Manor (*Doe de Dunraven v. Williams*, 1836, 7 Car. & P. 332; 48 R. R. 792).

(f) It is presumed that every enclosure made by a tenant adjoining the demised premises is made for the benefit of his landlord (*ibid.*).

(g) Possession of land is *prima facie* evidence of seisin in fee (*Asher v. Whitlock*, 1865, L. R. 1 Q. B. 1; 11 Ruling Cases, 542).

Besides these there are many statutory presumptions, which have the effect of shifting the burden of proof in particular proceedings (see *e.g.* sec. 5 of the Moneylenders' Act, 1900, 63 & 64 Vict. c. 51, as to knowledge of infancy; sec. 4 of the Sale of Food and Drugs Act, 1899, 62 & 63 Vict. c. 51, as to the genuineness of milk; and sec. 4 of the Licensing Act, 1902, 2 Edw. VII. c. 28, as to permitting drunkenness on licensed premises; sec. 147 of the Factory and Workshop Act, 1901, 1 Edw. VII. c. 22; and sec. 2 of the Licensing Act, 1902, as to proof of infancy; and sec. 1 of the Musical Copyright Act, 1906 (presumption of guilt from possession of pirated copies)).

(3) Presumptions of fact are any inferences which a jury may draw or not, according to the circumstances of the case. They are not rules of law, and a judge ought not to direct a jury that they must draw them. Some of these presumptions are well recognised and of frequent occurrence, and are scarcely distinguishable from presumptions of law. Such is the presumption that a person in possession of recently stolen property stole it, or received it knowing it to have been stolen (*R. v. Langmead*, 1864, L. & C. 427; 9 Cox C. C. 464).

In the Divorce Court adultery is constantly presumed from cohabitation.

For cases in which negligence has been presumed from the mere happening of events which could scarcely have happened without negligence (*res ipsa loquitur*), see *Kearney v. L. B. & S. C. Rly. Co.*, 1870, 1 L. R. 5 Q. B. 411; *Scott v. London Dock Co.*, 1865, 3 H. & C. 596; *Skinner v. L. B. & S. C. Rly. Co.*, 1850, 5 Ex. 787.

There is a general presumption of fact, or perhaps of law, in favour of continuance. What is proved to have existed at one time may be presumed to exist for some time after, longer or shorter, according to circumstances. Thus a debt having been proved, it is presumed that it continues till payment or discharge is proved (*Jackson v. Irvin*, 1809, 2 Camp. 50; 11 R. R. 658). Every person is *prima facie* sane, but a man proved to have been insane at one time is presumed to continue so (*Smith v. Tebbitt*, 1868, L. R. 1 P. & D. 398, 434; *Dyce Sombre v. Troup*, 1856, Dea. & Swa. 22, 38, 49; 26 L. T. 288). There is a presumption of fact that a person proved to have been alive, continues to live for some indefinite time after, unless his death is proved or may be presumed (*Re Phen's Trusts*, 1869, L. R. 5 Ch. 139). There is no rule as to when the presumption of life ceases (see *Doe v. Deakin and Walley*, 1828, 3 Car. & P. 402; 8 Barn. & Cress. 22; *Doe v. Andrews*, 1850, 15 Q. B.

756; *Doe v. Davies*, 1847, 10 Q. B. 314; *Doe v. Michael*, 1851, 17 Q. B. 276; *Manby v. Curtis*, 1815, 1 Price, 225).

[*Authorities*.—Taylor on *Evidence*, pt. i. ch. 5; Wills on *Evidence*, 2nd ed., p. 43; Phipson on *Evidence*, 4th ed., ch. 48.]

Presumptive Heir.—See HEIR, Vol. VI., at p. 524.

Presumptive Title.—A barely presumptive title arises out of the mere possession or occupation of property, without any other apparent right to have such possession or occupation. Any possession is a legal possession against a wrong-doer (Lord Kenyon in *Graham v. Peat*, 1801, 1 East, 244; 6 R. R. 268). It will not avail a wrong-doer to set up that some third person has a better right than the possessor. This is called the right of possession in contradistinction with the right to possession. There is always a strong presumption in favour of the *jus possessionis* or occupier's right to possess; in fact, proof of the possession of land is *prima facie* evidence of seisin, though a presumption of this kind is always rebuttable by showing facts which raise a contrary and stronger presumption, as, for example, a subsequent adverse possession for forty years (*Jayne v. Price*, 1814, 5 Taun. 326; 15 R. R. 518). So where a vestry had let the grazing on a highway for 115 years, it was held that a lawful origin must be presumed from the long usage, and that the soil of the highway was, in the parish, subject to the public right of way (*Haigh v. West*, [1893] 2 Q. B. 19). But such a presumption will not be made where to raise it would contravene the provisions of an Act of Parliament (*Neaverson v. Peterborough Rural Council*, [1902] 1 Ch. 557). If there has been a conveyance or transfer of the title, but the person to whom it has been conveyed or transferred has neglected for a long time to avail himself of his rights, there may be a presumption of a reconveyance (*Doe d. Rees v. Williams*, 1837, 2 Mee. & W. 749; *Tenny d. Whinnet v. Jones*, 1833, 3 Moo. & S. 472). A possessor has a devisable interest, and, notwithstanding the infirmity of the testator's title (being one of bare possession only) his devisee can recover the land against a person not showing a better title (*Asher v. Whitlock*, 1865, L. R. 1 Q. B. 1). When one man disseises another, or where, after the death of a person seised in fee simple, and before the heir has entered, a stranger takes possession and keeps it to the exclusion of the heir, the possession acquired will enable the occupier to maintain an action for trespass against anyone not able to show a better title in himself, and will by lapse of time ripen into a complete and indefeasible ownership. The old feudal maxim was that seisin must be the basis or starting-point of every title, except in the case of descent, and therefore seisin is presumed from possession, even though no actual title-deeds are forthcoming, so long, that is, as no stronger presumptive title is shown.

See tit. POSSESSION, *Exclusive Occupation*, p. 320, *supra*.

Pretenced Right.—Pretenced rights or titles arise under the Statute 32 Hen. VIII. (1540), c. 9, s. 2, and comprise either titles for which in fact there is no foundation, that is to say, fictitious titles, or rights or titles which, though not fictitious, were not as the law stood at the date of that enactment capable of being conveyed (Co. Litt. 369a; *Doe d. Williams v. Evans*, 1845, 1 C. B. 724). Before the statute above mentioned the common law was that he who was out of possession might not bargain, grant, or let his right or title, and if

he had done it, it should have been void (*Partridge v. Strange and Croker*, 1552, Pl. Com. 77, 88). This doctrine was simply confirmed by the Pretenced Title Statute and a penalty superadded.

Under this Act, buying or selling a pretended title included the buying or selling lands of which the title was known to be in dispute, below the value which they would have had if the title had not been in dispute, and to the intent that the buyer might carry on the suit in place of the seller. So, too, it was immaterial whether the title sold was good or bad (*Goodwin v. Butcher*, 1675, 2 Mod. 67). If the forfeiture was incurred, the whole transaction was void (*Doe d. Williams v. Evans*, *supra*). But where the action was against a *buyer*, it was essential that his knowledge of the fact that the title was only pretended should be established (*Slywright v. Page*, 1587, Golds. 101).

Such was the state of matters down to 1845. In that year the 8 & 9 Vict. c. 106, s. 6, made rights of entry alienable by deed, but the Pretenced Title Act was not repealed (see *Jenkins v. Jones*, 1882, 9 Q. B. D. 128). Since 1845, therefore, a grant of lands to which the grantor has an actual title, though he has never been in possession, is valid; that is, mere non-possession no longer is an essential feature of pretended rights. In an action against a buyer, consequently, the onus is now on the plaintiff to show not only that the title purchased is bad, but also that the buyer knew that it was bad in fact, and the mere fact that the right purchased was barred by the Statute of Limitations at the time of the purchase will not necessarily render the title pretended (*Kennedy v. Lyell*, 1885, 15 Q. B. D. 491).

Prevarication.—See WITNESS.

Preventive Service; Water-Guard.—See COAST-GUARD.

Previous Conviction.—It has been the policy of the legislature since the mitigation of the severe punishments at one time imposed on criminals, to provide for a gradual increase of severity of punishment in the case of habitual offenders.

Persons convicted of felony after a previous conviction of felony, are liable to penal servitude for life, or not less than three years (7 & 8 Geo. IV. c. 28, s. 11; 54 & 55 Vict. c. 69, s. 1). Simple larceny after a previous conviction of felony, whether summarily or on indictment, is punishable by penal servitude from three to ten years (24 & 25 Vict. c. 96, s. 7). Simple larceny, or any offence punishable as such—(1) if committed after conviction of an indictable misdemeanor under the Larceny Act, 1861, is punishable by penal servitude from three to seven years (24 & 25 Vict. c. 96, s. 8); see *R. v. Horn*, 1883, 15 Cox, 205; (2) if committed after two summary convictions under the Summary Jurisdiction Act, 1879, or the Larceny or Malicious Damage Acts of 1861, is felony, and punishable by penal servitude from three to seven years. These punishments are all alternative to imprisonment for not over two years, with or without hard labour (54 & 55 Vict. c. 69, s. 1); and boys under sixteen may be whipped in addition, or in the alternative.

In the case of adults, where a previous conviction on indictment is proved, any summary jurisdiction which would otherwise attach is taken away (42 & 43 Vict. c. 49, s. 14).

Persons convicted by a jury (*R. v. Blaby*, [1894] 2 Q. B. 170) or on their own confession of an offence against secs. 9-11 of the Coinage Offences Act, 1861, after a previous conviction of any such offence, are guilty of felony, and liable to penal servitude for life, or not less than three years (24 & 25 Vict. c. 99, s. 12).

To warrant the increased punishment it is necessary in the indictment, after charging the subsequent offence, to state that the accused has been previously convicted of felony or the particular offence. The second charge is not stated to the jury, nor is evidence given on it until the subsequent offence is proved or confessed (*R. v. Fox*, 1866, 10 Cox, 502 Ir.), unless the accused gives or calls evidence as to character (7 & 8 Geo. iv. c. 28, s. 11; 6 & 7 Will. iv. c. 111; 24 & 25 Vict. c. 96, s. 116; c. 99, s. 37; 34 & 35 Vict. c. 112, s. 9), or the nature or conduct of the defence, etc., lets in evidence of previous convictions (61 & 62 Vict. c. 36, s. 1; Archb. *Cr. Pl.*, 23rd ed., 395).

In *Faulkner v. R.*, [1903] 2 K. B. 76, it was held that the words any offence after a previous conviction (in 24 & 25 Vict. c. 96, s. 116) were not limited to offences under the Larceny Act, 1861 (or the Acts incorporated therewith). In that case the subsequent offence charged was an attempt to commit larceny.

The previous conviction is usually proved by a certificate of the conviction, or in the case of a summary conviction by a copy thereof, and the identity of the accused with the person named therein is proved by a warder who had him in custody (7 & 8 Geo. iv. c. 28, s. 11; 14 & 15 Vict. c. 99, s. 13; 28 & 29 Vict. c. 18, s. 6 (where the defendant is a witness); 34 & 35 Vict. 112, s. 18; and see Arch. *Cr. Pl.*, 23rd ed., 360, 1317).

In numerous cases offences punishable on summary conviction are subjected by the Act creating them to a severer punishment on a subsequent conviction (see BROTHEL; MALICIOUS DAMAGE). Where on the subsequent conviction a sentence of over three months' imprisonment can be imposed, the defendant may elect to be tried on indictment (42 & 43 Vict. c. 49, s. 17). In such cases the indictment must aver the previous conviction, but it is not submitted to the jury until after conviction of the subsequent offence (*R. v. Huberty*, 1905, 70 J. P. 6).

Secs. 7, 8 of the Prevention of Crime Act, 1871, 34 & 35 Vict. c. 112, provide for the measures for control and supervision of persons convicted of crime after a previous conviction thereof. By crime is here meant (s. 20)—

- (i.) Felony;
- (ii.) Uttering false or counterfeit coin, or possessing counterfeit gold or silver coins (24 & 25 Vict. c. 99, ss. 9-11);
- (iii.) Obtaining goods or money by false pretences (24 & 25 Vict. c. 96, s. 88);
- (iv.) Conspiracy to defraud;
- (v.) Being armed, with intent to break and enter any house in the night (24 & 25 Vict. c. 96, s. 58).

Where a man is twice convicted of crime as above defined, he is guilty of an offence punishable on summary conviction by imprisonment, with or without hard labour, for not more than one year, if within seven years from expiration of a sentence of imprisonment or penal servitude for the second offence; and in the case of release, a licence during the currency of the licence also—

- (1) There are reasonable grounds for holding that he is getting his living dishonestly.

(2) On being charged with any offence he refuses his name or address, or gives a false name or address.

(3) He is found in any place under circumstances which satisfy the Court that he was about to commit, and was committing any offence.

(4) If he is found in a dwelling-house or certain other places without being able to satisfy the Court as to his object in being there.

Provision is made for arrest and summary punishment (34 & 35 Vict. c. 112, s. 7; 54 & 55 Vict. c. 69, s. 6).

The accused may elect to be tried on indictment, 42 & 43 Vict. c. 49, s. 17 (see *R. v. Willcox*, 37 W. R. 686). If he does so the indictment should charge the previous conviction and it must be given in evidence to the jury on the trial for the subsequent offence (*R. v. Penfold*, [1902] 1 K. B. 547).

Persons twice convicted of crime as above defined, may also be subjected to POLICE SUPERVISION (34 & 35 Vict. c. 112, s. 8; 54 & 55 Vict. c. 69, s. 4; and see PENAL SERVITUDE).

Previous convictions of crime may not be put in evidence on the trial for a subsequent offence unless evidence of good character is tendered on behalf of the accused (6 & 7 Will. IV. c. 111); and a prisoner who gives evidence on his own behalf may not be examined as to convictions of other crimes unless the proof that he has been convicted of the other crime is admissible to prove his guilt of the offence charged, or unless the witnesses for the prosecution have been examined with a view to establish his good character, or unless the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or the prisoner gives evidence against a co-defendant (61 & 62 Vict. c. 36, s. 1 (*f*); *R. v. Rouse*, [1904] 1 K. B. 184; *R. v. Hadwen*, [1902] 1 K. B. 882; Arch., Cr. Pl., 23rd ed., 395). As to evidence of previous conviction on charges of receiving, see RECEIVING.

Pricking for Sheriffs.—See SHERIFF.

Priest.—The office of priest is the second order of the ministry in the Catholic Church, and admission thereto follows admission as a deacon, which in the Church of England may be attained at twenty-three years of age, but no person can be admitted a priest until he is twenty-four. At their respective ordinations, a deacon receives "authority to execute the office of a deacon in the Church of God;" and a priest, "authority to preach the word of God and to minister the holy sacraments in the congregation where he shall be lawfully appointed thereunto," the form of words (previously uttered by the officiating bishop) conferring the priestly office being as follows:—

Receive the Holy Ghost for the office and work of a priest in the Church of God, now committed unto thee by the imposition of our hands. Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained. And be thou a faithful dispenser of the word of God, and of the holy sacraments; in the name of the Father, and of the Son, and of the Holy Ghost.

In accordance with the forms of words here quoted (it will be noted), it is "the priest alone" who is authorised by the rubric to pronounce the "Absolution" at morning or evening prayer, and to "absolve him"

who shall "desire it" at the visitation of the sick. But the reading by a deacon of those portions (other than the Absolution) of morning and evening prayer which are directed by the rubric to be read by a priest is a practice now firmly established. By Canon 36 of the Canons of 1603, a priest may not preach without a licence under seal from the archbishop of the province or bishop of the diocese where he is placed, or from one of the two universities of Oxford or Cambridge under its seal; but induction into a benefice nevertheless gives a right to the incumbent inducted to preach (see further, articles CLERGY; HOLY ORDERS; INCUMBENT).

[*Authorities.*—Watson's *Clergyman's Law*; Phillimore's *Ecc. Law*, 2nd ed.; and see *Prayer-Book, Form and Manner of Making of Deacons and of Ordering of Priests.*]

Primæ impressionis.—See IMPRESSION (FIRST).

Primage.—This is a charge payable as a gratuity to the master of a ship by a charterer or shipper of goods. "It is called in the old books hat money, and *les contributions des chausses ou pot du vin du maître*, which clearly refers to a personal collection by the master" (Lord Tenterden, *Best v. Saunders*, 1828, Moo. & M. 208; 32 R. R. 712). In a case where, by the bill of lading, goods were to be delivered "on payment of freight with primage and average accustomed," and the consignee had paid the freight to the shipowner, the master was held entitled to primage, although by the contract (there being no charter-party) between the shipowner and the consignee £5 per ton freight was to be paid without any mention of primage, and by the contract between the master and shipowner the former was to receive a sum certain "in lieu of all cabin and other allowances" (*ibid.*); and, similarly, where the master's agreement was for "£10 a month wages, one-third of all passage moneys, and owner to find the cabin," the master was held entitled to primage (*Charleton v. Cotesworth*, 1829, Ry. & M. 175; 27 R. R. 741). Where the defendant chartered the plaintiff's ship, of which the plaintiff was master, and agreed to pay freight and £25 gratuity to the captain before the ship sailed, it was held that in an action for the gratuity the defendant could not set up the master's misconduct as a defence, but must bring a cross action (*Seeger v. Duthie*, 1860, 29 L. J. C. P. 253, 259). This privilege of the master is, however, generally now taken away by the terms of the contract between him and the shipowner; and thus, in a case where a charterer undertook to "ship a full cargo for an English port at a freight of sixty shillings per ton in full, ship paying all port charges, pilotages, and towages," and master to sign bills of lading, and the master, who was paid a fixed salary, to include all charges and allowances, signed a bill of lading for the whole cargo, making the goods "deliverable to order or assigns, freight to be paid in cash at port of discharge, rate of discharge and freight and other conditions as per contract of payment with 5 per cent. primage in cash on delivery as customary," and the assignees received the cargo and paid the freight, the master was not allowed to recover primage from them (*Caughey v. Gordon*, 1878, 3 C. P. D. 419).

Primary Evidence.—See EVIDENCE.

Primate.—See ARCHBISHOP.

Prime Minister.—This, the chief of all Government offices, is of comparatively recent growth in our constitution. The main factor which made possible the existence of a Minister of the Crown of more importance and greater influence than the rest of the "King's servants" was the disappearance of the Sovereign from the meetings of the Cabinet. When George I. ascended the throne, disinclination for business and ignorance of the English language kept him away from the meetings of his Ministers. With the Sovereign absent the inevitable tendency was for one of the Ministers, either by reason of his personal force of character or his influence with the King, to take the lead of his colleagues, and such a Minister, though his powers in that day were vague, shadowy, and transient, may be regarded as the historical ancestor of the Prime Minister of our times. To-day the Prime Minister is the pivot of our existing governmental system, and may be described as the party leader who has been invited by the King to form a ministry, in the assurance either that he and his ministry will receive the confidence and support of a majority of an existing House of Commons in the task of carrying on the government of the country, or that, if the majority of the House is hostile, he will appeal to the country to return a House of Commons who will support his policy. Until the beginning of the seventeenth century the title was unknown, it being first heard of on the return to the throne of Charles II., when Ormond suggested to Clarendon that the latter should assume the position of "Chief Minister" (Clarendon, *Autobiography*, i. 420). There was little more in the suggestion than the adoption of a name, as Clarendon was already far above the other Ministers in point of power and influence, but he was only *primus inter pares*, for the King personally chose each individual Minister; the rule not being then, as it is now, for the King to accept the Prime Minister's recommendations. The Cabinet of that day, too, had no collective responsibility. Ministers were responsible neither to it nor to the Chief Minister, and each went his own way in matters of legislation (Clarendon, *ibid.*, iv. 344-9).

During the reign of William III. nothing is heard of a Chief Minister, as the King took affairs into his own hands; it was merely a question of which of his Ministers most enjoyed his confidence. Though during the reign of Anne party divisions began to develop along the lines of Whig and Tory, the Cabinet still contained members of both factions, and Harley, whom Swift describes as Prime Minister, did not choose his own colleagues, and could not prevent persons opposed to his policy from being made Ministers by the Queen (Anson's *Law and Custom of the Constitution*, 3rd ed., 1907, vol. ii. p. 114). The advent of Walpole as a Minister of George II. was the beginning of that change which has resulted in our modern system of one man's personal responsibility to the Crown for the proper government of the country.

When Walpole entered the Cabinet, though a man of known ability, he was merely one among many. In course of time a fierce struggle for personal predominance ensued, and one by one his colleagues either submitted to his influence or left the Cabinet. Though never asked by the King to form a Cabinet of his own he held the royal favour throughout a long course of years. His position of pre-eminence was also consolidated through his establishment of a gigantic system of what nowadays would be termed political corruption, by means of which he was enabled throughout his period of power to retain the support of a majority of the House of Commons.

The term Prime Minister was never used by Walpole, as he feared it would be unpopular and cause the people to think him a royal favourite; and he was always accustomed to say that he was only one of the King's Council, without more voice in affairs than any other member of the Cabinet. But those with a knowledge of affairs clearly appreciated his true position. In 1740 a motion was introduced into both Houses of Parliament praying the Crown to remove Walpole from the King's Council, but it was defeated. The protest of the dissentients in the House of Lords clearly indicates the public view of this Minister's position. "Because we are persuaded that a sole, or even a First Minister is an office unknown to the law of Britain, inconsistent with the constitution of this country, and destructive of liberty in any Government whatsoever. And it plainly appearing to us that Sir Robert Walpole for many years has acted as such, by taking upon himself the chief, if not the sole, direction of affairs in the different branches of the administration, we could not but esteem it to be our indispensable duty to offer our most humble advice to His Majesty for the removal of a Minister so dangerous to the King and kingdom" (*Lords' Journals*, xxv. 596).

The vigorous attempts of George III. to assert his personal prerogative in the government of the country put a stop to anything like lasting consolidation of power in the hands of an individual Minister, and it was not until Pitt's time that a Prime Minister again came to be recognised as necessary. Pitt's statement to Dundas during some negotiations connected with the admission of Addington to the Cabinet discloses how definite the idea of the position of the Prime Minister had become. He points out that it is "an absolute necessity in the conduct of the affairs of this country that there should be an avowed and real Minister possessing the chief weight in the Council and the principal place in the confidence of the King. That power must rest in the person generally called First Minister" (Stanhope, *Life of Pitt*, iv. 24). In 1784 the Cabinet consisted only of seven persons, but in 1805 had grown considerably larger. With the growth of the Cabinet, composed as it has been for more than a century of the chief executive officers of the Government, the Prime Minister's power and influence have steadily grown also. The immersion of his colleagues in administrative business has left to him the general direction of party policy and Cabinet legislation. The influence of the press and the extension of the franchise have done more than anything else to place the Prime Minister in that position of dictatorship which he holds to-day. Power rests with the House of Commons, and the expression of its will is tempered directly by the successful estimation by its members of the popular feeling. The two great parties are led by individuals, and when a party is returned to power, the people, though choosing in their constituencies a member of the House of Commons, are in reality voting for a Prime Minister. Thus an office entirely unknown to our constitutional law has become the essential pivot of English government.

When a man in response to a summons from the King attends, "kisses hands," and accepts the commission to form a ministry he becomes Prime Minister. If his summons be due to the resignation of party opponents his task is to choose a new Cabinet, but if to take the place of one of his own party who has died or resigned only a rearrangement of ministerial offices need take place. The principal Ministers—that is the members of the Cabinet—hold their offices direct

from the King, and having been appointed by him deliver up their seals only to him when they resign. In the case of reconstruction by a new Prime Minister the Cabinet places itself at his disposal, and only those resignations follow which in his opinion are necessary for the changes he intends to make. In practice the Prime Minister consults what is known as the "inner ring" of the party; in other words, the few influential persons whose opinions matter, though Mr. Gladstone, who held very autocratic views of the Prime Minister's position, considered that the Cabinet had no kind of right to be consulted as to the appointment of a new Minister (Morley's *Gladstone*, iii. 101*n.*).

As individuals vary in force of character and in power of managing men so must the position of the Prime Minister alter from time to time. The strong man may become an autocrat, the weak one but an amiable Chairman of Committee, seldom asserting his theoretical authority, and doing his best to keep the peace between conflicting interests.

The magnitude of the Prime Minister's task prevents his exercising any of that general supervision over departments that Peel considered essential and found possible in the early part of the last century. He must trust to his colleagues, and can only take up specific questions when they become matters of vital importance. The House of Commons has become more and more exacting in its demands on the time of the Prime Minister, and invariably shows signs of irritation at his absence from the Government Bench in times of debate on important subjects. On such matters it expects to hear him freely and fully, and not by deputy. He must, moreover, be frequently heard at large meetings throughout the country, and as often as not will adumbrate thereat points of policy not yet brought before Parliament. In addition, he must keep himself fully informed of the general trend of foreign, colonial, and domestic affairs, and must be prepared to recommend proper individuals to the Crown for service in Church and State. If his colleagues cannot agree with his policy, his views are final, and it is their duty to leave his Cabinet (see Resignation Letters in the *Times*, 1903, Sept. 18, Oct. 1, 6, and article CABINET, Vol. II. p. 505). Whether a Prime Minister can continue in power after losing colleagues depends partly upon their importance and partly upon the strength of his own personality with the public.

Of recent years there have been frequent discussions as to which House of Parliament the Prime Minister should sit in. It is obviously better, other things being equal, that he should sit in the House of Commons, as if he should be a member of the Upper House he will be compelled to find a man not only able to work with and under him, but fit to lead the House of Commons, a man himself possessed of every qualification requisite for the Premiership. The Prime Minister does not as a rule take up administrative work, though Lord Salisbury was for some years Prime Minister and Foreign Secretary, and Mr. Gladstone Prime Minister and Chancellor of the Exchequer; but Lord Salisbury had no arduous work in the Commons, and the office of Chancellor of the Exchequer is not always pressing on the time of its holder. As a rule the Prime Minister takes the nominal office of First Lord of the Treasury. This yields him a salary, the higher office being in law intangible and, in fact, unremunerated. Lord Salisbury on retiring from the Foreign Secretaryship became Lord Privy Seal, with a salary attached to that office. Mr. Asquith, the present Prime Minister, and his two

immediate predecessors have all held the office of First Lord of the Treasury in conjunction with that of Prime Minister.

The Prime Minister is chosen directly by the King. The choice of the Crown is limited only to the extent that the man to whom the commission of forming a ministry is entrusted must, from his political position, be able to form a Cabinet strong enough to secure the support of a majority of the House of Commons. Sometimes a ministry which possesses a majority in the Lower House resigns and one of the opposition leaders is summoned by the King to form a ministry, but this is on the understanding that an early dissolution will follow in order to give the country an opportunity of supporting or rejecting the new Prime Minister. It has been said that it is the duty of a retiring Prime Minister to suggest the name of his successor to the Crown, but this puts the case too high; and it must be held that advice may be given if asked, but, constitutionally, advice need not be asked, and need not be taken even if asked and given. Such was the view taken by Queen Victoria on Mr. Gladstone's resignation in 1894. The Liberal party was divided between Sir William Harcourt and Lord Rosebery, with a strong inclination towards the former. Mr. Gladstone would have recommended Lord Spencer. The Queen asked for no advice and "sent for" Lord Rosebery, who accepted office and carried on the government of the country until the dissolution of 1895 (Morley's *Gladstone*, iii. 512). Sometimes one of the great parties meets and solemnly elects a "leader." This was done by the Liberal party in the case of Sir Henry Campbell-Bannerman while his party was in opposition, and although an ex-Premier, Lord Rosebery, was still in political life. When in 1905 Mr. Balfour resigned, the King sent for the elected leader of the opposition, who became Prime Minister. It may be taken that where a man stands out as the head of his party, either by election on the part of his House of Commons' followers (like the late Premier), or by force of his personality in Parliament and in the country (like Mr. Asquith, the present Premier), he would be chosen by the Crown at once as the person who could command the confidence of a majority of the House of Commons. But there may arise an occasion when no man stands forth pre-eminent, when two, three, or even four politicians might reasonably hope to be "sent for." In such an event the burden of choice rests solely on the Crown.

As already pointed out the office of Prime Minister is unknown to the Law, and as such its holder receives no salary. The term is not found in any Act of Parliament nor in the records of either House. In the Treaty of Berlin Lord Beaconsfield described himself as Prime Minister of England, and yet Mr. Gladstone in his letter of resignation to Queen Victoria in 1894 makes no mention of the term Prime Minister, but speaks merely of "his resignation of the high offices which Your Majesty has been pleased to intrust to him" (Morley's *Gladstone*, iii. 515). When Sir Henry Campbell-Bannerman accepted office on the resignation of Mr. Balfour's Government, a Royal Warrant, dated December 2, 1905, was issued, from which the words following are extracted: "Whereas we, taking into our royal consideration that the precedence of our Prime Minister has not been declared or defined by due authority, we deem it therefore expedient that the same should be henceforth established and defined. . . . We declare that . . . the Prime Minister . . . shall have place and precedence next after the Archbishop of York. . . ." *I.e.* excluding the Royal Princes, the third place of precedence in the land.

British colonies which possess "responsible government" have naturally adopted as a basis the English parliamentary system, their Prime Ministers standing in a similar relationship to the Governor (the Crown's representative) as the Prime Minister of the Imperial Parliament bears to the Crown itself. In some colonies the office is directly recognised and salaried, but in the majority of cases it is held together with one or more administrative offices, there being little call on the time of a colonial Prime Minister as such. In foreign countries which have adopted the English system there is a Prime Minister and a Cabinet, but as in such cases "groups" usually replace our two-party system the Prime Minister's period of power is short, and his election is rather due to Parliamentary changes and chances than to any indirect selection by the people at large. In several foreign countries the Prime Minister holds no other office.

Primo Beneficio.—A writ addressed by the Sovereign to the Lord Chancellor or Lord Keeper, directing him to bestow upon the person named therein the first vacant benefice in the royal gift, above or below a certain value.

Primogeniture.—See INHERITANCE; REAL PROPERTY, *Descent of*; and *cp.* BOROUGH ENGLISH; GAVELKIND.

Prince Consort.—See SOVEREIGN.

Prince Edward Island.—See CANADA.

Prince of Wales.—See CORNWALL; WALES.

Prince of Wales' Island.—See STRAITS SETTLEMENTS.

Princes of the Blood.—See ROYAL FAMILY.

Princes, Restraint of.—See PRINCES, RULERS, AND PEOPLES.

Princes, Rulers, and Peoples.—"Arrests, restraints, and detentions of princes, rulers, and peoples," or some such phrase, is a common exception to the shipowner's liability in contracts of affreightment and a peril regularly insured against in the ordinary marine policy. Similar exceptions are against *force majeure* (*Yrazu v. Astral S. C.*, 1903, 9 C. C. 100); or "war disturbance or any other cause" (*Tallimans v. S. S. Knutsford*, 1907, 13 C. C. 82).

In either contract the phrase "comprehends every case of interruption to the adventure by lawful authority," including every species of *vis major* which is not covered by the exceptions of King's enemies, and perils of the seas (including pirates) (Byles, J., *Russell v. Niemann*, 1864, 34 L. J. C. P. 10, 14). It does not include the act of any Court of law or judicial tribunal (*Finlay v. Liverpool & G. W. S. S. Co.*, 1870, 3 M. L. C. 487); but it must be the act of the Government of this country or some friendly Power for State purposes (*Crew, Widgery & Co. v. G. W. S. S. Co.*, 1887, W. N. 161).

The words extend beyond physical seizure or arrest; they will cover an embargo (*Rotch v. Edie*, 1795, 6 T. R. 413; 3 R. R. 222); an ordinary

municipal law affecting the delivery of the cargo (*Miller v. Law Accident Co.*, [1903] 1 K. B. 712, where a warranty against capture, seizure, and detention was held to release underwriters from liability under restraints of people, etc.); a blockade (*Geipel v. Smith*, 1872, L. R. 7 Q. B. 404); a siege (*Rodocanachi v. Elliott*, 1874, L. R. 9 C.P. 518), whether caused by the act of a foreign or native Government (*Green v. Young*, 1701, 2 Lord Raymond, 840—British ship seized by British Government; *Aubert v. Gray*, 1862, 3 B. & S. 163, 169—Spanish ship seized by Spanish Government; and in *Robinson v. Alliance I. C.*, [1904] A. C. 359); where seizure took place before war broke out by a State afterwards hostile to Great Britain of property belonging to subjects of that State, a warranty free of capture, seizure, or detention before or after declaration of war was held to prevail over the underwriter's liability for restraints of princes, etc.; (and see Carver, 82); but not hostile, or practically hostile acts done by the Government of the assured if a British subject (*Touteng v. Hubbard*, 1802, 3 Bos. & Pul. 291; 6 R. R. 791), nor (in a policy) the giving up of a voyage owing to the interdiction of commerce at, or blockade or hostile possession of, the port of destination (*Hadkinson v. Robinson*, 1803, 3 Bos. & Pul. 388; 7 R. R. 786; *Lubbock v. Rowcroft*, 1803, 5 Esp. 49); for the peril insured against must be one acting on the subject insured immediately, and not circuitously, and fear of blockade or seizure is not a peril in the ordinary policy (*Atkinson v. Ritchie*, 1809, 10 East, 530, Lord Ellenborough; 10 R. R. 372). But the contract may provide for this case; thus, under a bill of lading excepting restraints of princes, and providing that in case of blockade of the port of discharge, or if entering or discharging in the port of discharge should be considered unsafe by the master by reason of war, the master might land the goods at nearest safe port, where the ship was carrying a cargo of explosives for Yokohama, and when she got to Hong-Kong war had broken out between China and Japan, and the master thinking that the cargo would be seized as contraband if carried to its destination, and therefore delivered it at Hong-Kong, it was held that the delivery was prevented by the exception, and the shipowner was not liable (*Nobel's Explosives Co. v. Jenkins*, 1896, 1 Com. Cas. 436); and it has been laid down that an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, justifies delay in prosecuting a voyage under a charter-party excepting restraints of princes and rulers (*The San Roman*, 1873, L. R. 5 P. C. 301). The words "restraints of princes, rulers, political disturbances or impediments during voyage," cover a delay owing to the railway by which the goods were to be sent to the port where the ship lay being in the hands of revolutionary troops, and a delay owing to the ship, after leaving that port, being obliged to pay dues at another port to the *de facto* Government there, after having already paid them at the first port to the *de jure* Government (*Smith v. Rosario Nitrate N. C. L.*, [1894] 1 Q. B. 174). Under a time charter providing that the payment of hire should cease during loss of time caused by specified hindrances, not including quarantine, and restraints of princes and rulers were mutually excepted, it was held that the vessel being detained in quarantine the charterers were liable to pay hire for such time (*Aktieselskabet Lina v. Turnbull*, 1907, S. L. R. 367). Under a bill of lading excepting loss through restraints of princes, where the plaintiffs shipped goods on board the defendants' ship destined for Algoa Bay, and to be sold to the British Government for supplying the British troops in the Transvaal,

and the defendants, without the plaintiffs' knowledge, shipped goods consigned to the Transvaal Government, or to Transvaal residents, which led to the vessel's arrest and detention, it was held that the defendants were guilty of a breach of duty towards the plaintiffs, and the loss in value of the goods owing to the detention could be recovered (*Dunn v. Bucknall*, [1902] 2 K. B. 614).

The word "people" does not include anything but the ruling power of a country; and the seizure of a cargo of corn by starving people on the Irish coast was held not to come within the exception (*Nesbitt v. Lushington*, 1792, 4 T. R. 783; 2 R. R. 519). In a charter-party the exception is considered to be for the benefit of the shipper no less than than that of the shipowner; and it covers delay in discharging an outward cargo at a foreign port caused by the refusal of the military commander of hostile forces in possession of the port to allow grain (the homeward cargo) to be exported (*Bruce v. Nicolopulo*, 1855, 24 L. J. Ex. 321).

[*Authorities*.—Abbott, *Shipping*, 14th ed., 1901; Carver, *Carriage by Sea*, 4th ed., 1905; Arnould, *Marine Insurance*, 7th ed., 1901.]

Principal and Accessory.—See ACCESSORY.

Principal and Agent.

TABLE OF CONTENTS.

Admissions of Agent	521	Estoppel of Agent	501
Agency—		Factors Act	518
Definition and Nature of	486	Fraud of Agent	529
How Constituted	488	Gaming Contracts	510, 512
How Determined	540	Holding Out	516
Agent—		Implied Authority	495
Relations with Principal	499	Implied Warranty of Authority	526
Relations with Third Persons	532	Indemnity of Agent	511
Appointment of Agent	489	Irrevocable Authority	540
Authority of Agent	494	Lien of Agent	514
Implied	495	Misrepresentations by Agent	529
As between Principal and Third		Negligence of Agent	506
Persons	515	Negotiable Securities—	
When Irrevocable	540	Dealings by Agent with	520
Revocation of	542	Notice to Agent	522
Warranty of	526	Payment to Agent	494, 500
Breach of Duty by Agent	506	Precedents	545
Bribery of Agent	507	Principal—	
Capacity of Parties	486	Relations with Agent	499
Co-Agents	488	Relations with Third Persons	515
Commission	508	Ratification	490
Contracts of Agent—		Reimbursement of Agent	511
Liability of Principal on	524	Remuneration of Agent	508
Right of Principal to Sue on	527	Revocation of Agency	542
Foreign Principals	525, 528	Secret Profits	504
Discharge of Principal	525, 526	Sub-Agents	498
Giving Credit to Agent	525	Torts of Agent—	
Defences against Principal	529	Liability of Principal for	530
Liability of Agent on	532	Liability of Agent for	539
Right of Agent to Sue on	538	Usage of Trade—	
Ratification of Unauthorised	491, 492	How far Binding on Principal	494, 497, 504, 512
Crimes by Agents	544	Wagering Contracts	510, 512
Custom of Trade—		Warranty of Authority	526
How far Binding on Principal	494, 497, 504, 512	Wrongs of Agent—	
Delegation	497	Liability of Principal for	530
Determination of Agency	540	Liability of Agent for	539
Duties of Agent	499		

Definition and Nature of Agency.—Where one person authorises another to represent him, or act on his behalf, and undertakes to be answerable for what that other does within the scope of his authority, and such other person undertakes to exercise the authority conferred upon him, and in the exercise thereof, to obey any lawful instructions which may be given to him by the first-mentioned person, the first-mentioned person is called a principal, the other person an agent, and the relation created between them a contract of agency. The difference between an agent and an independent contractor is that an agent undertakes to act in the matter of the agency subject to the directions and control of his employer, whereas an independent contractor does not, but merely contracts to perform certain specified work, or produce a certain specified result, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract (see *Reedie v. L. & N.-W. Rly. Co.*, 1849, 4 Ex. Rep. 244; *Quarman v. Burnett*, 1840, 6 Mee. & W. 499; 55 R. R. 717). In the most perfect type of agency, where the agent acts and contracts in the name of the principal, the principal, and the principal alone, is responsible to third persons, and is entitled to sue them, in respect of the acts and contracts of the agent done and entered into on his behalf, the agent being looked upon as a mere instrument. But this type may be modified in various ways. The agent may not be authorised to pledge the credit of the principal directly to third persons. He usually has no such authority where the principal is a foreigner. The right of the principal to sue, and his liability to be sued, upon an instrument executed, or contract made, by the agent, may be excluded by the form of execution, or by the terms of the contract. The agent may, by contracting personally, pledge his own credit as well as that of the principal, in which case the other contracting party may elect whether he will charge the principal or the agent, and may be sued by either of them. It is an implied term of every contract of agency, that the principal will indemnify the agent against all expenses, losses, and liabilities incurred by him in the proper execution of his authority, and that the agent will pay over or account to the principal for all profits and benefits acquired in the course or by means of the agency. Sometimes an agent guarantees to the principal that the persons with whom he enters into contracts on the principal's behalf shall duly perform those contracts (see DEL CREDERE AGENT).

The relation of principal and agent constitutes no justification for the commission of a wrong. A contract of agency cannot impose upon the agent any obligation to do a wrongful act, nor discharge him from any liability in respect thereof. Where an agent, whether innocently or not, commits a wrong by the authority of the principal, they are liable as joint wrong-doers. The same rule applies where a wrong is committed by an agent in the ordinary course of his employment on behalf of the principal, though the principal did not authorise, and even if he expressly forbade, the commission of the wrong. An agent who does an act which is obviously, or to his knowledge, wrongful, has no claim for indemnity under the contract of agency. In such a case any promise by the principal to indemnify him is void.

This article does not apply to agents of the Crown or Government; as to which, see PUBLIC AGENT.

Capacity of Parties.—The capacity of a person to enter into and incur liability upon a contract of agency, whether as principal or agent,

depends upon his general capacity to contract (*Smally v. Smally*, 1700, 1 Eq. Ca. Abr. 6; 21 E. R. 831). A person may, however, be liable to third persons in respect of acts or contracts done or entered into by his authority, where such acts or contracts are such as he would be capable of doing or entering into in person, though the contract of agency by which the authority is conferred is not binding upon him, in consequence of his general incapacity to contract (*R. v. Longnor*, 1833, 4 Barn. & Adol. 647; *Drew v. Nunn*, 1879, 4 Q. B. D. 661; *Campbell v. Hooper*, 1855, 24 L. J. Ch. 644; *Ex parte Bradbury*, 1839, Mont. & Chit. 625). It is not necessary that the agent, in order to contract and act so as to bind the principal, should have capacity to contract or act on his own behalf. The act of an agent is in law deemed to be the act of the principal, and therefore all persons of sound mind, including infants and others not *sui juris*, are capable of acting as agents, though they may not be liable on the contract of agency.

What may be Delegated.—Except where otherwise provided by statute (e.g. by Lord Tenterden's Act), it is a general rule of law that a person may do by means of an agent whatever he has power to do himself (*Furnivall v. Hudson*, [1893] 1 Ch. 335, where a grantee of a bill of sale executed it as agent for the grantor). In *Tharsis Copper Co. v. La Société des Métaux*, 1889, 58 L. J. Q. B. 435, it was held that a foreign corporation, which had by a contract submitted to the jurisdiction of the English Court, might appoint an agent to accept service of the writ on its behalf, and that service on such an agent operated as a service on the corporation, though it was not a good service according to the Rules of Court. An exception to the rule exists in the case of powers, authorities, and duties of a confidential or personal nature. A person who is given a power or authority the exercise of which involves discretion must, as a general rule, exercise it in person. Thus, the donee of a special power of appointment cannot delegate the power to an agent (*Ingram v. Ingram*, 1740, 2 Atk. 88; 26 E. R. 455; *Topham v. Portland*, 1863, 32 L. J. Ch. 257). So, where the consent of a person is required for the execution of a power of appointment, he must give such consent in person, and cannot appoint an agent to consent in his stead (*Hawkins v. Kemp*, 1803, 3 East, 410). The general disability of an agent to delegate his authority is founded on the same principle. As to the employment of agents by trustees, see Trustee Act, 1893, s. 17; *Speight v. Gaunt*, 1883, 9 App. Cas. 1; *Fry v. Tapson*, 1884, 28 Ch. D. 268.

The question whether a specific legal duty may be performed by means of an agent or deputy depends upon the nature of the duty. A duty which is merely ministerial may be delegated, but not a duty the performance of which involves discretion or skill (*London County Council v. Hobbs*, 1897, 75 L. T. 688). In no case can a person, by delegating the performance of a duty imposed upon him, whether to an agent or an independent contractor, escape from liability for the non-performance or improper performance of such duty (*Hughes v. Percival*, 1882, 8 App. Cas. 443; *Lemaitre v. Davis*, 1881, 19 Ch. D. 281; *Black v. Christchurch Co.*, [1894] A. C. 48; *Hardaker v. Idle*, [1896] 1 Q. B. 335).

Lord Tenterden's Act, 9 Geo. iv. c. 14, requires that certain transactions, to be effectual in law, shall be evidenced by writing signed by the party to be charged, and it has been held that the provisions of the Act are not satisfied by the signature of an agent for such party, even if such signature be expressly ratified by the principal (*Williams*

v. *Mason*, 1873, 28 L. T. 232; *Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301; *Hyde v. Johnson*, 1836, 2 Bing. N. C. 776; 42 R. R. 737. See, however, sec. 13 of the Mercantile Law Amendment Act, 1856, amending, in this respect, the 1st and 8th sections of Lord Tenterden's Act). As a general rule, however, it is a sufficient compliance with the provisions of a statute requiring a person's signature, if the name of that person is signed by a duly authorised agent, unless a contrary intention plainly appears (*France v. Dutton*, [1891] 2 Q. B. 208). An agent may be appointed to subscribe the name of his principal to the memorandum of association of a joint-stock company (*In re Whitley*, 1886, 32 Ch. D. 337), or to the instrument of dissolution of a building society (*Dennison v. Jeffs*, [1896] 1 Ch. 611), and such a signature will satisfy the provisions of sec. 6 of the Companies Act, 1862, or sec. 32 of the Building Societies Act, 1874.

Co-Agents.—An authority given to two or more agents jointly, and not severally, can only be validly exercised by them all acting in concert, unless it is provided that less than the full number of them shall form a quorum (*Brown v. Andrew*, 1849, 18 L. J. Q. B. 153; *Boyd v. Durand*, 1809, 2 Taun. 161; *Bell v. Nixon*, 1832, 9 Bing. 393; *In re Liverpool Household Stores*, 1890, 59 L. J. Ch. 616). And where an authority is given to two or more, it is presumed to be given to them jointly and not severally, unless a contrary intention appears from the nature or terms of the authority, or from the circumstances of the particular case. In *Brown v. Andrew* (cited *supra*) the act of six out of eight persons appointed to act as a managing committee, was held not binding on the principals. An authority given to two or more persons severally, or jointly and severally, may, in general, be executed by any one or more of them without the concurrence of the other or others (*Guthrie v. Armstrong*, 1822, 5 Barn. & Ald. 628). See, however, on this point, *Co. Litt.* 181b.

Agency, how Constituted.—A contract of agency, like any other contract, can exist only by virtue of the mutual assent of the parties (*Markwick v. Hardingham*, 1880, 15 Ch. D. 349; *Pole v. Leask*, 1862, 33 L. J. Ch. 155). Such assent may be given expressly, or may be implied from the conduct or situation of the parties (*Pole v. Leask*, *supra*; *Roberts v. Ogilby*, 1821, 9 Price Ex. 269; *Moore v. Peachey*, 1891, 7 T. L. R. 748). The auctioneer at a sale by auction is an implied agent for the purpose of signing the contract of sale on behalf of the highest bidder, so as to satisfy the Statute of Frauds, or the 4th section of the Sale of Goods Act, 1893, the assent of such bidder being implied from his conduct in bidding at the sale (*Emmerson v. Heelis*, 1809, 2 Taun. 38; 11 R. R. 520; *White v. Proctor*, 1811, 4 Taun. 209; 13 R. R. 580; *Sims v. Landray*, [1894] 2 Ch. 318). The authority of the auctioneer, in such a case, is limited to signing at the time of the sale, and there is no such implication of authority in the case of his clerk, unless the bidder by words or signs shows that he assents to the clerk's signing for him instead of the auctioneer (*Bell v. Balls*, [1897] 1 Ch. 663). As to the implied authority of married women to pledge their husband's credit for necessaries, see HUSBAND AND WIFE. If a man lives with a woman as his wife, she has implied authority to pledge his credit, during the continuance of the cohabitation, to the same extent as if she were legally married to him (*Watson v. Threlkeld*, 1794, 2 Esp. 637; 5 R. R. 760; *Ryan v. Sams*, 1848, 12 Q. B. 460; 76 R. R. 312). The assent of the principal to the contract of agency may be given subsequent to the

performance of the contract by the agent. It is a principle of the law of agency, that where an act is done by a person on behalf of another, though without any precedent authority, express or implied, the person on whose behalf the act is done may, as a general rule, by subsequently ratifying it, render it as valid, to all intents, as if he had previously authorised it; and such ratification may be implied from his conduct. Another principle of the law of agency, founded on the ordinary doctrine of estoppel *in pais*, is that if a person by his conduct holds out that a contract of agency exists between him and another person, he will not be permitted to deny the existence thereof, with respect to any third persons acting on the faith of such holding out (*Pole v. Leask*, 1862, 33 L. J. Ch. 155). The relation of principal and agent, then, may be constituted by express agreement between the principal and agent; by implication of law from their conduct or situation; or by the subsequent ratification by the principal of acts done on his behalf; and a person may be estopped by his conduct from denying the existence of such a relation, though it does not in fact exist. In some of the cases of so-called "agency of necessity," most of which are connected with maritime law (see AVERAGE; SALVAGE), the assent of the principal is purely fictitious; and in others, notably in the case of a wife deserted by her husband (see *Johnston v. Sumner*, 1858, 3 H. & N. 261; *Harris v. Morris*, 1801, 4 Esp. 41; 2 R. R. 786), the agent has authority in law to bind the principal, notwithstanding his express dissent; but such cases are instances of QUASI-CONTRACTS, not true contracts of agency.

Appointment of Agent.—No particular formality is requisite for the appointment of an agent, except in the case of an appointment by a corporation, or where the agent is authorised to execute a deed on behalf of the principal. An agent may be appointed, and his authority conferred, verbally, for the purpose of entering into and signing a written contract, so as to satisfy the provisions of the Statute of Frauds, or the 4th section of the Sale of Goods Act, 1893 (*Mortlock v. Buller*, 1804, 10 Ves. Jun. 311; 32 E. R. 857; 7 R. R. 417; *Coles v. Trecothick*, 1804, 9 Ves. Jun. 234; 32 E. R. 592; 7 R. R. 167; *Heard v. Pilley*, 1869, L. R. 4 Ch. 548).

Authority to execute a deed must be given by an instrument under seal (see POWER-OF ATTORNEY), except where the deed is executed in the name and presence of the principal, and he there and then authorises its execution, in which case the authority may be given by word of mouth or by signs (*R. v. Longnor*, 1833, 4 Barn. & Adol. 647; *Berkley v. Hardy*, 1826, 5 Barn. & Cress. 355; 29 R. R. 261; *Harrison v. Jackson*, 1797, 7 T. R. 207; 5 R. R. 422). The memorandum of association of a joint-stock company is not a deed, and the name of a principal may be subscribed thereto by an agent appointed by parol (*In re Whitley*, 1886, 32 Ch. D. 337).

At common law a corporation could only appoint an agent by an instrument under its common seal (*Kidderminster v. Hardwicke*, 1873, L. R. 9 Ex. 13; *R. v. Stamford*, 1844, 6 Ad. & E. N. S. 433). In *Austin v. Bethnal Green Guardians*, 1874, L. R. 9 C. P. 91, it was held that the engagement, by a board of guardians, of a clerk to the master of a work-house, must be under seal, to bind the board of guardians. And in *Arnold v. Mayor of Poole*, 1842, 5 Sco. N. R. 741, a similar decision was given in the case of the appointment of a solicitor by a municipal corporation (see also *Sutton v. Spectacle Makers Co.*, 1864, 10 L. T. 411). Various exceptions to the rule have, however, been established. It does

not apply at all in the case of trading corporations (*South of Ireland Colliery Co. v. Waddle*, 1869, L. R. 4 C. P. 617; *Henderson v. Australian S. N. Co.*, 1855, 5 El. & Bl. 409), or joint-stock companies (30 & 31 Vict. c. 131, s. 37; 8 & 9 Vict. c. 16, s. 97), or industrial or provident societies (39 & 40 Vict. c. 45, s. 11 (12)). And whenever the affixing of the seal would be very inconvenient, a corporation may bind itself by parol (*Church v. Imp. Gas Co.*, 1838, 6 Ad. & E. 846; 45 R. R. 638; *Ludlow v. Charlton*, 1840, 6 Mee. & W. 815, 822; 55 R. R. 794).

Ratification.—The doctrine of ratification, as expressed in the maxim *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, is that where one person does any act or enters into any transaction professedly on behalf of another person, the subsequent ratification by such other person of such act or transaction is equivalent to his having previously authorised it. The doctrine applies not only where an agent exceeds his authority, but also where the person doing the act or entering into the transaction has no authority to act for the other at all.

What may be ratified.—The principle of ratification applies to torts, as well as to contracts and other acts and transactions (*Wilson v. Tunman*, 1843, 6 Man. & G. 236; 64 R. R. 770; *Hilberry v. Hatton*, 1864, 2 H. & C. 822; *Ancona v. Marks*, 1862, 7 H. & N. 686). But it applies only to voidable acts and transactions, and not to such as are in their inception void (*Spackman v. Evans*, 1868, L. R. 3 H. L. 171, 244; *Banque Jacques Cartier v. Banque D'Epargne*, 1887, 13 App. Cas. 111). On this ground it was held in *Brook v. Hook*, 1871, L. R. 6 Ex. 89, that a forgery was incapable of ratification, and from the wording of sec. 24 of the Bills of Exchange Act, 1882, the legislature seems to have intended to confirm that view. Lord Blackburn, however, in *McKenzie v. British Linen Co.*, 1881, 6 App. Cas. 82, expressed a decided opinion to the effect that the execution of a forged instrument might be ratified so as to render the person ratifying it civilly liable on the instrument, though not as to make a defence for the forger against a criminal charge. A corporation or incorporated company cannot bind itself by the ratification of any contract or act which is *ultra vires*, even with the assent of every one of its members, because such a contract or act is one which it has no power to authorise, and which is therefore, so far as concerns the corporation or company, absolutely void (*Ashbury Carriage Co. v. Riche*, 1875, L. R. 7 H. L. 653; *Flitcroft's Case*, 1882, 21 Ch. D. 519).

Who may ratify.—An act or transaction can only be ratified by the person on whose behalf it was assumed to be done or entered into. If A. professes to make an agreement on his own behalf, or on behalf of B., the agreement cannot be ratified by C. (*Saunderson v. Griffiths*, 1826, 5 Barn. & Cress. 909; *Heath v. Chilton*, 1844, 12 Mee. & W. 632; 67 R. R. 447). Where a colonel of a volunteer corps made a contract professedly on behalf of the corps, both he and the other contracting party erroneously thinking that the corps as an entity might be bound, it was held that the contract could not be ratified by individual members of the corps, because it was not made on their behalf as individuals (*Jones v. Hope*, 1880, 3 T. L. R. 247, note). So, if a sheriff, acting under a valid writ of execution, wrongfully seizes goods which do not belong to the debtor, the execution creditor cannot ratify such wrongful seizure, because the act is not done on his behalf, but in performance of a public duty (*Wilson v. Tunman*, 1843, 6 Man. & G. 236; 64 R. R. 770; *Woollen v. Wright*, 1862, 1 H. & C. 554). It is also necessary that the principal should be in existence at the time when the act is done. An incor-

porated company cannot ratify a contract which was entered into before its incorporation (*Kelner v. Baxter*, 1866, L. R. 2 C. P. 174; *In re Empress Engineering Co.*, 1880, 16 Ch. D. 125; [*Natal Land and Colonisation Co. v. Pauline Colliery and Development Syndicate*, [1904] A. C. 120]), though it may make a new contract on the same terms (*Howard v. Patent Ivory Co.*, 1888, 38 Ch. D. 156). It is not necessary, however, that the principal should be known to the agent at the time when the act is done. An insurance may be effected on behalf, generally, of every person interested in the property insured, and any person interested may subsequently ratify the insurance to the extent of his interest (*Hagedorn v. Oliverson*, 1814, 2 M. & S. 485; 15 R. R. 317). So, a person may act on behalf of an heir, or an administrator, or the owner of particular property, whoever he may be, though unascertained and unknown to him, and when ascertained, the person on whose behalf the act was done may ratify it (*Lyall v. Kennedy*, 1889, 14 App. Cas. 437; *Foster v. Bates*, 1843, 12 Mee. & W. 226; 67 R. R. 311). An executor or administrator may ratify acts or transactions done or entered into on behalf of the estate, though they were done or entered into before the grant of probate or letters of administration, because his title relates back to the time of the death of the deceased (*Whitehead v. Taylor*, 1839, 10 Ad. & E. 210; 50 R. R. 385; *Foster v. Bates*, *supra*). [Where a contract of purchase or other obligation is made by a person on behalf of a third party, on whose account he has no authority to make a binding agreement, a subsequent ratification by such third party will not render the terms of the agreement obligatory upon him (*Keighley, Maxted & Co. v. Durant*, [1901] A. C. 240).]

Limitations to the Doctrine.—The doctrine of ratification is subject to the following limitations and qualifications:—(1) Where it is essential to the validity of a particular act that it should be done within a fixed time, the ratification of the act after that time has expired does not affect the rights of third persons. In *Dibbins v. Dibbins*, [1896] 2 Ch. 348, where it was agreed between two partners that the survivor of them should have the option of purchasing the share of the other, upon giving notice to his executors within a specified time after the death, it was held that a notice given within such time on behalf of the survivor, but without his authority, could not be ratified, so as to bind the executors, after the time for giving notice had expired. So, a notice to quit cannot be rendered binding on a tenant by the landlord's ratification after the expiration of the time for giving notice (*Doe d. Mann v. Walters*, 1830, 10 Barn. & Cress. 626; 34 R. R. 522; *Doe d. Lyster v. Goldwin*, 1841, 1 Gal. & Dav. 463). See, also, *Bird v. Brown*, 1850, 4 Ex. Rep. 786, where a ratification of a stoppage of goods *in transitu* was held ineffectual because the ratification took place after the goods had arrived at their destination. (2) Where, except in the case of the ratification of a contract, an act is of such a nature that, if it had been duly authorised, it would have imposed a duty on any third person, the ratification of such act does not operate to impose such duty retrospectively. Thus, the ratification by a creditor of an unauthorised demand for a debt, does not deprive the debtor of his right to plead and take advantage of a tender made previously to the demand (*Coles v. Bell*, 1808, 1 Camp. N. P. 478; *Coore v. Callaway*, 1794, 1 Esp. 115; see also *Solomons v. Dawes*, 1794, 1 Esp. 83). (3) A ratification cannot operate to divest or prejudicially affect any proprietary right vested in any third person at the time of the ratification (*Donnelly v. Popham*, 1807, 1 Taun. 1; 9 R. R. 687; *Bird v.*

Brown, 1850, 4 Ex. Rep. 786). (4) A payment cannot be ratified after the money paid has been returned to the person who paid it. If a person pays a debt without the authority of the debtor, the debtor, though he at first refuses to recognise the payment, may subsequently ratify and take advantage of it (*Simpson v. Eggington*, 1855, 10 Ex. Rep. 845); but the creditor may, in such a case, if he chooses, return the money to the person who paid it, and if he does so, the debtor cannot afterwards ratify or take advantage of the payment (*Walter v. James*, 1871, L. R. 6 Ex. 124). (5) Where an act is wrongful on the part of the person doing it, because it is done without authority, it can only be justified by a ratification at a time when it could lawfully be done by the principal (*Bird v. Brown*, *supra*). [Where an agent, limited by his principal in contractual power, enters into a binding agreement with a third party, on the distinct understanding that such third party will do certain specific work for his principal, in the event of the third party varying the term of the contract so as to produce something entirely different from the thing originally contracted for, there is no implied ratification by the principal of the contract, although he may take over the completed article (*Forman v. The Liddesdale*, [1900] A. C. 190). Nor is a principal, who has ratified by acceptance a contract made on his behalf by an agent, bound thereby when such agent acting in a dual capacity and in the secret interests of a third party, induced his original employer to enter into the contract by misrepresentation (*Bancroft v. Heath*, 1900, 5 Com. Cas. 110). And this rule is not varied by the fact that the third party may have been innocent of the misstatements (*Biggar v. Rock Life Insurance Co.*, [1902] 1 K. B. 516).]

Ratification of Contracts.—A contract must be ratified within a reasonable time after it is entered into, and before it is time for the other contracting party to commence the performance thereof, in order by the ratification to render it binding upon him (*Met. Asylum Board v. Kingham*, 1890, 6 T. L. R. 217). A contract of insurance may, however, be ratified after the loss of the property insured, though the principal have notice of such loss at the time of the ratification (*Williams v. North China Ass. Co.*, 1876, 1 C. P. D. 757; *Cory v. Patton*, 1874, L. R. 9 Q. B. 577). And a person may ratify a contract made on his behalf, though he at first repudiates it as not having been made by his authority (*Soames v. Spencer*, 1822, 1 Dow. & Ry. K. B. 32; 24 R. R. 631). Where a person accepts an offer on behalf of another, the acceptance may be ratified, and the contract thereby be made complete and binding on the person making the offer, although before the time of the ratification such person has given notice to the principal of his withdrawal of the offer; because the ratification relates back to the time of the acceptance, and thereby renders the withdrawal of the offer inoperative (*Bolton v. Lambert*, 1888, 41 Ch. D. 295).

Form and Conditions of Ratification.—The execution of a deed can only be effectively ratified by matter of record or by deed (*Oxford v. Crow*, [1893] 3 Ch. 535; *Hunter v. Parker*, 1840, 7 Mee. & W. 322; 56 R. R. 723; *Tupper v. Foulkes*, 1861, 9 C. B. N. S. 797). Subject to this, a ratification may be express or implied, and no particular formality is necessary. A written contract may be ratified verbally, or by conduct, even if it be a contract which by statute is unenforceable unless evidenced by writing (*Maclean v. Dunn*, 1828, 1 Moo. & P. 761; *Soames v. Spencer*, 1822, 1 Dow. & Ry. K. B. 32). A ratification of an act or transaction will be implied whenever the conduct of the person on

whose behalf it is done or entered into is such as to indicate an intention by him to adopt or recognise it in whole or in part, and a ratification of part of a transaction operates as a ratification of the whole (*Hovil v. Pack*, 1806, 7 East, 164; *Benham v. Batty*, 1865, 12 L. T. 266; *Ferguson v. Carrington*, 1829, 9 Barn. & Cress. 59; *Keay v. Fenwick*, 1876, 1 C. P. D. 745; *Bristow v. Whitmore*, 1861, 9 H. L. C. 391; 11 E. R. 781). The receipt of the purchase-money, or part thereof, operates as a ratification of an unauthorised sale (*The Bonita*, 1861, 30 L. J. Ad. 145; *Brewer v. Sparrow*, 1827, 7 Barn. & Cress. 310). So, where a principal, whose agent had purchased goods at a price in excess of his limit, disposed of a portion of the goods, he was held to have ratified the purchase, though he expressly objected to it on account of the price (*Cornwall v. Wilson*, 1750, 1 Ves. Jun. 510). In the case of an agent acting in excess of his authority, a ratification may be implied from the mere silence or acquiescence of the principal (*Prince v. Clark*, 1823, 1 Barn. & Cress. 186; 25 R. R. 352; *Pott v. Bevan*, 1844, 1 Car. & Kir. 335; *Robinson v. Gleadow*, 1835, 2 Bing. N. C. 156; 42 R. R. 568). A person will not be deemed, however, to ratify any act or transaction done or entered into without his authority, unless at the time of the ratification he has a full knowledge of all the material circumstances (*Edwards v. L. & N.-W. Rly. Co.*, 1870, L. R. 5 C. P. 445; *The Bonita*, 1861, Lush. 252; *Gunn v. Roberts*, 1874, L. R. 9 C. P. 331; *Lewis v. Read*, 1845, 13 Mee. & W. 834; 67 R. R. 828), or his conduct is such as to clearly indicate an intention by him to take the risk, and ratify the act or transaction, whatever may have been the circumstances (*Haselar v. Lemoyne*, 1858, 5 C. B. N. S. 530; *Fitzmaurice v. Bayley*, 1856, 6 El. & Bl. 868; *Marsh v. Joseph*, [1897] 1 Ch. 214); but it is not necessary that he should be aware of the legal effect of the act or transaction (*Powell v. Smith*, 1872, L. R. 14 Eq. 85).

Effect of Ratification.—Subject to the limitations and qualifications mentioned above, the consequences of a ratification are the same in all respects as if the act or transaction had been previously authorised. As between principal and agent, the agent is discharged from liability for having exceeded his authority (*Clarke v. Perrier*, 1679, 2 Freem. K. B. 48; *Smith v. Cologan*, 1788, 2 T. R. 189; *Cornwall v. Wilson*, 1750, 1 Ves. 510; *Risbourg v. Bruckner*, 1858, 3 C. B. N. S. 812; *Brewer v. Sparrow*, 1827, 7 Barn. & Cress. 310), and has the same rights of remuneration and indemnity as he would have had if he had been duly authorised (*Keay v. Fenwick*, 1876, 1 C. P. D. 745; *Mason v. Clifton*, 1863, 3 F. & F. 899; *Frixione v. Tagliaferro*, 1856, 10 Moo. P. C. 175). A person cannot take the benefit of a transaction unless he also adopts the burdens connected therewith (*Bristow v. Whitmore*, 1861, 9 H. L. C. 391; 11 E. R. 781; *Hall v. Laver*, 1842, 1 Hare, 571; 66 E. R. 1158; 58 R. R. 198). With respect to third persons, if a contract is ratified, it becomes the contract of the principal, and he is entitled to sue, and liable to be sued, upon it, and the contract is deemed to have been made by his duly authorised agent within the meaning of the Statute of Frauds (*Maclean v. Dunn*, 1828, 1 Moo. & P. 761; 29 R. R. 714; *Soames v. Spencer*, 1822, 1 Dow. & Ry. K. B. 32; *Williams v. North China Ass. Co.*, 1876, 1 C. P. D. 757). The ratification of a contract also discharges the agent from liability to the other contracting party in respect of the implied warranty of authority. The ratification of a wrongful act renders the principal liable as a joint wrong-doer with the agent (*Hilberry v. Hatton*, 1864, 2 H. & C. 822; *Eastern Counties Rly.*

Co. v. Broom, 1851, 6 Ex. Rep. 314), unless the act would have been justifiable at the instance of the principal, in which case the effect of the ratification is to discharge the agent from liability for the wrong, even if an action be pending against him in respect thereof at the time of the ratification (*Whitehead v. Taylor*, 1839, 10 Ad. & E. 210; 50 R. R. 385; *Hull v. Pickersgill*, 1819, 3 Moo. K. B. 612; 21 R. R. 598). A ratification does not invest the agent with any new authority (*Irvine v. Union Bank of Australia*, 1877, 2 App. Cas. 366).

Authority of Agents.—The authority of an agent may be express or implied. It cannot in any case exceed the powers of the principal, from whom it is derived, because a person cannot authorise what he has himself no power to do (*Shrewsbury Rly. Co. v. L. & N.-W. Rly. Co.*, 1857, 6 Cl. H. L. 113; *Poulton v. L. & S.-W. Rly. Co.*, 1867, L. R. 2 Q. B. 534; *Montreal Ass. Co. v. McGillivray*, 1859, 13 Moo. P. C. 87; 15 E. R. 33). The authority may be conferred, and its nature and extent defined, by writing, or by word of mouth, or may be inferred from a course of dealing between the principal and agent (*Pole v. Leask*, 1860, 28 Beav. 562; 54 E. R. 481). As to the construction of an authority given by deed, see POWER OF ATTORNEY. Where the authority is given verbally, or by writing not under seal, it is construed liberally, having due regard to the purposes for which it is given (*Pole v. Leask*, 1860, 28 Beav. 562; *Entwisle v. Dent*, 1848, 1 Ex. Rep. 812; *Pariente v. Lubbock*, 1855, 8 De G., M. & G. 5; 44 E. R. 290); but not so as to authorise the agent to act otherwise than in the usual way and according to the ordinary course of business (*Wiltshire v. Sims*, 1808, 1 Camp. N. P. 258; 10 R. R. 673; *Helyear v. Hawke*, 1803, 5 Esp. 72). If the authority is given in such ambiguous terms as to be reasonably capable of more than one construction, and the agent in good faith adopts and acts upon one of the constructions of which it is capable, he is deemed to have acted within the scope of the authority, and the principal is bound with respect to the agent and also with respect to third persons, though the construction adopted and acted upon was not the one intended by the principal (*Ireland v. Livingston*, 1872, L. R. 5 H. L. 395; *Boden v. French*, 1851, 10 C. B. 886).

Authority to receive Payment.—Where an agent is authorised to receive payment of money, he has, *primâ facie*, only authority to receive payment in the ordinary course of business and in cash (*Sykes v. Giles*, 1839, 5 Mee. & W. 645; *Coupe v. Collyer*, 1890, 62 L. T. 927). Thus, if an agent, being authorised to sell goods and receive payment of the price, sells the goods on credit, the principal is not bound by a payment made to the agent before the expiration of the credit, unless it is customary in the ordinary course of the particular business to make payments before they are due (*Catterall v. Hindle*, 1867, L. R. 2 C. P. 368; *Heisch v. Carrington*, 1833, 5 Car. & P. 471; 38 R. R. 835; *Breming v. Mackie*, 1862, 3 F. & F. 197). So, where an auctioneer is authorised to receive payment for goods sold, or an insurance broker to receive payment of a loss, he has *primâ facie* no authority to take a bill of exchange in payment (*Williams v. Evans*, 1866, L. R. 1 Q. B. 352; *Ferrers v. Robbins*, 1835, 2 C. M. & R. 152; *Hine v. S. S. Insurance Syndicate*, 1895, 72 L. T. 79). Nor is an agent justified in taking a cheque in lieu of cash unless it is customary to do so in the ordinary course of the business in which he is employed (*Papé v. Westacott*, [1894] 1 Q. B. 272; *Blumberg v. Life Interests, etc., Corporation*, [1897] 1 Ch. 171; *Bridges v. Garrett*, 1870, L. R. 5 C. P. 451). A custom or usage of a particular market, whereby

a set-off against, or settlement of accounts with, an agent is considered equivalent to payment, is only binding as between the agent and the person with whom the settlement is made, and not upon the principal, unless at the time when he authorised the agent to receive payment he knew of the existence of such custom or usage, and agreed to be bound thereby (*Pearson v. Scott*, 1878, 9 Ch. D. 198; *Blackburn v. Mason*, 1893, 68 L. T. 510; *Sweeting v. Pearce*, 1859, 7 C. B. N. S. 449). If, however, an agent is authorised to receive payment, and to retain the amount received, or part thereof, in discharge of a debt due to him from the principal, he has authority, to the extent of his debt, to settle in whatever way he pleases with the person from whom he is authorised to receive payment (*Barker v. Greenwood*, 1836, 2 Y. & C. Ex. 414; 47 R. R. 431).

Implied Authority.—Subject to the express instructions of the principal, an agent has implied authority to do whatever is necessary for, or ordinarily incidental in, the usual course of business, to the effective execution of his express authority (*Beaufort v. Neeld*, 1845, 12 Cl. & Fin. 248; 8 E. R. 1399; *Pole v. Leask*, 1860, 28 Beav. 562; *Dingle v. Hare*, 1859, 7 C. B. N. S. 145; *Young v. Cole*, 1837, 3 Bing. N. S. 724). Thus, authority to enter into a binding contract implies authority to sign a memorandum thereof, where such a memorandum is required by statute (*Durrell v. Evans*, 1862, 1 H. & C. 174; *Parton v. Crofts*, 1864, 16 C. B. N. S. 11), and to do everything in the usual course of business necessary to complete the bargain (*Bayley v. Wilkins*, 1849, 7 C. B. 886; 78 R. R. 849). Authority to procure a bill to be discounted implies authority to warrant the bill, but not to indorse it in the principal's name (*Fenn v. Harrison*, 1791, 3 T. R. 757; 4 T. R. 177). Authority to find a purchaser for property implies authority to describe the property, and to state any facts or circumstances having a bearing upon its value (*Mullens v. Miller*, 1882, 22 Ch. D. 194); but not to enter into a contract for the sale thereof (*Chadburne v. Moore*, 1892, 61 L. J. Ch. 674; *Hamer v. Sharp*, 1874, L. R. 19 Eq. 108). [But in *Rosenbaum v. Belson*, [1900] 2 Ch. 267, it was held that instructions by an owner of real property to an agent to sell the property for him, and an agreement to pay a commission on the purchase price accepted, amounted to an authority to the agent to make a binding contract, including an authority to sign a contract for sale.] Authority to sell a horse implies authority to warrant it, if either the principal or the agent is a horsedealer or other person who is accustomed to buying and selling horses (*Howard v. Sheward*, 1866, L. R. 2 C. P. 148; *Baldry v. Bates*, 1885, 52 L. T. 620), or if the horse is to be sold at a fair or public market-place (*Brooks v. Hassall*, 1883, 49 L. T. 569), but not, it seems, if neither principal nor agent is accustomed to buying and selling horses, and the horse is to be sold privately (*Brady v. Todd*, 1861, 9 C. B. N. S. 592). Authority to subscribe policies of insurance on behalf of an underwriter implies authority to adjust losses arising under the policies (*Richardson v. Anderson*, 1805, 1 Camp. N. P. 43; 10 R. R. 628), and to refer to arbitration any disputes about such losses (*Goodson v. Brooke*, 1815, 4 Camp. N. P. 163). So, a bailiff who is authorised to levy a distress has implied authority to receive the rent and expenses due, and a tender thereof to him operates as a tender to the landlord (*Hatch v. Hale*, 1850, 15 Ad. & E. N. S. 10). But an agent has no implied authority to do anything which is neither necessary for, nor ordinarily incidental to, the execution of his express authority in the usual way. Thus, an agent who is authorised merely to deliver a

horse has no implied authority to warrant it (*Woodin v. Burford*, 1834, 2 C. & M. 391; 39 R. R. 802). An agent who is authorised to receive rents has no implied authority, as such, to distrain (*Ward v. Shew*, 1833, 9 Bing. 608; 35 R. R. 640). An agent employed to sell an estate has no implied authority, as such, to receive the purchase-money (*Mynn v. Joliffe*, 1834, 1 Moo. & R. 326; 42 R. R. 802). So, an auctioneer who is authorised to sell goods by auction has no implied authority to sell them by private contract, even if the public sale proves abortive (*Daniel v. Adams*, 1764, Amb. 495; 27 E. R. 322; *Marsh v. Jelf*, 1862, 3 F. & F. 234). Nor does authority to sell goods imply authority to barter or pledge them (*City Bank v. Barrow*, 1880, 5 App. Cas. 664; *Guerreiro v. Peile*, 1820, 3 Barn. & Ald. 616; 22 R. R. 500; *Martini v. Coles*, 1813, 1 M. & S. 140; *Gill v. Kymer*, 1821, 5 Moo. K. B. 503). So, authority to send a draft contract for approval does not imply authority to sign a memorandum of the contract so as to satisfy the Statute of Frauds (*Smith v. Webster*, 1876, 3 Ch. D. 49). Nor does authority to enter into contracts imply authority to cancel or vary a contract made in pursuance thereof (*Xenos v. Wickham*, 1866, L. R. 2 H. L. 296; *Nelson v. Aldridge*, 1818, 2 Stark. N. P. 435; 20 R. R. 709). [An agent who has authority to pay a debt of his principal has authority to promise to pay it (*In re Hale, Lilley v. Foad*, [1899] 2 Ch. 107).]

Subject to the express terms of his authority and instructions, where an agent is given general authority to manage or carry on a particular trade or business, or otherwise to act in a particular capacity, he has implied authority to do whatever is necessary for, or incidental to, the ordinary conduct of such a trade or business, or whatever is within the scope of the usual authority of a person employed in such a capacity. Thus, a manager of an estate has implied authority to grant the usual and customary leases, and to give and receive notices to quit to and from the tenants (*Peers v. Sneyd*, 1853, 17 Beav. 151; 51 E. R. 990; *Papillon v. Brunton*, 1860, 5 H. & N. 518; *Jones v. Phipps*, 1868, L. R. 3 Q. B. 567). The managing owner of a ship has implied authority to pledge the credit of his co-owners for repairs, and all such other things as are necessary for the usual or suitable employment of the ship (*The Huntsman*, [1894] P. 214; *Barker v. Highley*, 1863, 15 C. B. N. S. 27). A manager of a beerhouse, to order cigars for sale in the beerhouse (*Watteau v. Fenwick*, [1893] 1 Q. B. 346). The general manager of a railway company, to pledge the company's credit for medical attendance for a servant of the company (*Walker v. G. W. Rly. Co.*, 1867, L. R. 2 Ex. 228). A traveller for the sale of goods in the provinces, to receive payment of the price of goods sold, but not to take other goods by way of payment (*Howard v. Chapman*, 1831, 4 Car. & P. 508; 34 R. R. 814). The matron of a hospital, to pledge the credit of the managing committee for butcher's meat for the use of the hospital (*Real and Personal Advance Co. v. Phalempin*, 1893, 9 T. L. R. 569). On the other hand, a mere rent collector has not implied authority, as such, to receive a notice of intention to quit from a tenant (*Pearse v. Boulter*, 1860, 2 F. & F. 133); nor a steward to grant leases for terms of years (*Collen v. Gardner*, 1856, 21 Beav. 540; 52 E. R. 968); nor a cashier of a picture engraver to sell the engravings (*Graves v. Masters*, 1883, 1 C. & E. 73). Nor has a stationmaster implied authority, as such, to pledge the company's credit for medical attendance for an injured passenger (*Cox v. Midland Rly. Co.*, 1849, 3 Ex. Rep. 268; 77 R. R. 623); nor a local agent of an insurance company to contract to grant a policy on the company's behalf

(*Linford v. Provincial Insurance Co.*, 1864, 34 Beav. 291; 55 E. R. 647); nor a manager of a bank to give into custody a supposed offender, on behalf of the bank (*Bank of New South Wales v. Ouston*, 1879, 4 App. Cas. 270); [nor an estate agent, as such, to enter into contracts for his employer (*Thuman v. Best*, 1907, 97 L. T. 239)]; nor does the relation of master and coachman of itself invest the coachman with ostensible authority to pledge his master's credit for forage (*Wright v. Glyn*, [1902] 1 K. B. 745)]. Authority to arrest persons, or give them into custody, is only implied when the duties of the agent would not be efficiently performed without such authority (*S. C. Stevens v. Hinshelwood*, 1891, 55 J. P. 341; *Allen v. L. & S.-W. Rly. Co.*, 1870, L. R. 6 Q. B. 65; *Abrahams v. Deakin*, [1891] 1 Q. B. 516). [As to an auctioneer (*q.v.*), see *Rainbow v. Howkins*, [1904] 2 K. B. 322.].

Authority implied from Special Customs and Usages.—An agent has implied authority to act, in the execution of his express authority, according to the reasonable rules, regulations, customs, and usages of the particular place, market, or business in which he is employed (*Sutton v. Tatham*, 1839, 10 Ad. & E. 27; *Pollock v. Stables*, 1848, 12 Q. B. 765; 76 R. R. 419; *Foster v. Pearson*, 1835, 1 C. M. & R. 849; 40 R. R. 744; *Hodgkinson v. Kelly*, 1868, 37 L. J. Ch. 837; *Cropper v. Cook*, 1868, L. R. 3 C. P. 194). Thus, if an agent is authorised to sell goods, and it is customary in the trade to warrant that particular class of goods, or to sell them on credit, he has implied authority to warrant them, or sell them on credit, as the case may be (*Dingle v. Hare*, 1859, 7 C. B. N. S. 145; *Pelham v. Hilder*, 1841, 1 Y. & C. C. 3; 62 E. R. 765; 57 R. R. 208). So, if a stockbroker is authorised to transact business on the Stock Exchange, he has implied authority to act according to the reasonable regulations and usages there in force (see *BROKER*, Vol. II. p. 420). This principle does not, however, apply when the usage or custom is an unreasonable one. In such a case, the agent has no implied authority to act in accordance therewith, unless the principal was aware of the existence of the usage or custom at the time when he conferred the authority. In *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802, it was proved to be the custom in the tallow trade for a broker, when authorised to buy tallow, to make one contract in his own name for the purchase of a sufficiently large quantity to satisfy the orders of several principals, and parcel it out amongst them, and the custom was rejected as unreasonable, on the ground that the effect of it was to change the intrinsic character of the contract of agency by turning the agent into a principal, and so giving him an interest in conflict with his duty.

Delegation of Agency.—The personal qualifications and character of the agent are frequently an important consideration in the making of a contract of agency, and he is therefore deemed, as a general rule, to undertake to exercise in person the authority conferred upon him, in the absence of agreement to the contrary. And an agent cannot delegate to another person powers which have been given to him on the understanding that he would exercise them himself (*delegatus non potest delegare*). Auctioneers (*Coles v. Trecothick*, 1804, 9 Ves. 234; 32 E. R. 592; 7 R. R. 167), factors (*Cockran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 257; *Catlin v. Bell*, 1815, 4 Camp. N. P. 183), brokers (*Henderson v. Barnewell*, 1827, 1 Y. & J. 387; 30 R. R. 799), directors (*Howard's Case*, 1866, L. R. 1 Ch. 561; *Cartmell's Case*, 1874, L. R. 9 Ch. 691), and other agents whose employment involves trust or confidence in their integrity, discretion, or skill (*Combe's Case*, 9 Co. Rep. 75; 77 E. R. 843;

Blore v. Sutton, 1816, 3 Mer. 237; 36 E. R. 91; 17 R. R. 74), have therefore, *primâ facie*, no power to delegate the authority conferred upon them. So, where a shipmaster was authorised to sell certain goods, it was held that he had no power to appoint another person to sell them, though he himself was unable to find a purchaser (*Catlin v. Bell*, 1815, 4 Camp. N. P. 183). An agent may, however, appoint a substitute or sub-agent, and delegate his authority to him, with the express or implied assent of the principal. Such assent will be implied where it appears from the conduct of the principal that he intended the agent to have power to delegate his authority, or where the authority is of such a nature as to necessitate its being exercised through a substitute or sub-agent, or unforeseen emergencies arise in the course of the agency which necessitate its being so exercised (*De Bussche v. Alt*, 1877, 8 Ch. D. 286; *Quebec, etc., Rly. Co. v. Quinn*, 1858, 12 Moo. P. C. 232; 14 E. R. 899; *Dew v. Metropolitan Rly. Co.*, 1885, 1 T. L. R. 358). Authority to employ a sub-agent may also be implied from the usage of the particular trade, profession, or business in which the agent is employed, provided that such usage is not unreasonable, nor inconsistent with the express terms of the contract of agency (*De Bussche v. Alt*, *supra*; *Griffiths v. Williams*, 1787, 1 T. R. 710; *Weary v. Alderson*, 1837, 2 Moo. & R. 127; *Solley v. Wood*, 1852, 16 Beav. 370; 51 E. R. 821). The maxim *delegatus non potest delegare* does not apply where the authority is merely ministerial, and the exercise thereof does not involve discretion or confidence. Thus, an agent may delegate to a sub-agent authority to draw or indorse a particular bill of exchange in the name of the principal (*Ex parte Sutton*, 1788, 2 Cox, 84; *Lord v. Hall*, 1848, 2 Car. & Kir. 698). So, it was held that though the liquidators of a company had no power to authorise one of their number to accept bills of exchange generally on behalf of them all, because the exercise of such an authority involved discretion, yet they might authorise him to accept a particular bill on their behalf (*Ex parte Birmingham Banking Co.*, 1868, L. R. 3 Ch. 651). As to the delegation of authority to sign a note or memorandum of a contract so as to satisfy the Statute of Frauds, see *White v. Proctor*, 1811, 4 Taun. 209; 13 R. R. 580; *Coles v. Trecothick*, 1804, 9 Ves. Jun. 234; 32 E. R. 592; 7 R. R. 167; *Blore v. Sutton*, 1816, 3 Mer. 237; 36 E. R. 91; 17 R. R. 74; *Bell v. Balls*, [1897] 1 Ch. 663.

Principal and Sub-Agent.—Where a substitute or sub-agent is appointed by an agent without the authority, express or implied, of his principal, no privity of contract arises between such substitute or sub-agent and the principal. The principal, therefore, incurs no liability to the substitute or sub-agent in respect of his disbursements or remuneration (*Schmaling v. Tomlinson*, 1815, 6 Taun. 147; *Mason v. Clifton*, 1863, 3 F. & F. 899; *Solly v. Rathbone*, 1814, 2 M. & S. 298; 17 R. R. 74), and is not bound by his acts, unless he ratifies them (*Dunlop v. De Murrieta*, 3 T. L. R. 166; *Blore v. Sutton*, 1816, 3 Mer. 237; 36 E. R. 91; 17 R. R. 74; *Wray v. Kemp*, 1883, 26 Ch. D. 169). In the case of a substitute or sub-agent appointed with the principal's express or implied assent, the question whether privity of contract arises between them depends upon the intention of the parties. If the agent was authorised, and intended, when appointing the substitute or sub-agent, to establish the relationship of principal and agent between the principal and such substitute or sub-agent, and such was also the intention of the substitute or sub-agent, then privity of contract is established in accordance with such intention. In *De Bussche v. Alt*, 1877, 8 Ch. D. 286, where a ship

was consigned to an agent in China, for sale, and such agent, with the knowledge and consent of the principal, employed another agent to sell her, it was held that privity of contract existed between the last-mentioned agent and the principal, so as to make such agent answerable directly to the principal for the due performance of his duties. But, as a general rule, there is no privity of contract between a principal and a sub-agent, the sub-agent being answerable to the agent employing him, and the agent to the principal (*Stephens v. Badcock*, 1832, 3 Barn. & Adol. 354; 37 R. R. 448; *Robbins v. Fennell*, 1847, 11 Q. B. 248; *Sims v. Brittain*, 1832, 4 Barn. & Adol. 375; *Montagu v. Forwood*, [1893] 2 Q. B. 350; *Ex parte Edwards*, 1881, 7 Q. B. D. 155). In *New Zealand, etc., Land Co. v. Watson*, 1881, 7 Q. B. D. 374, a factor, employed on a *del credere* commission to sell goods, sold them through a broker, who received the proceeds and made payments on account to the factor from time to time. It was held that there was no privity of contract between the broker and the principal, and that the broker was not liable to account to the principal for the proceeds remaining in his hands. So, in *Lockwood v. Abdy*, 1845, 14 Sim. 437; 60 E. R. 428; 65 R. R. 621, it was held that a sub-agent appointed by an agent was not liable to render an account of his agency to the principal, but only to the agent appointing him, though the sub-agent had taken over the entire management of the principal's affairs, and communicated directly with him.

RELATIONS BETWEEN PRINCIPAL AND AGENT.

The rights and duties of a principal and agent, as between themselves, depend upon the intention of the parties, to be ascertained from the terms of the contract of agency and the course of dealing between them. The rights and duties implied by law, as incident to the relationship of principal and agent, may be varied or excluded by agreement, express or implied.

Duties of Agents Generally.—The general duties of an agent are to perform the contract of agency (*Turpin v. Bilton*, 1843, 5 Man. & G. 455); to strictly pursue the terms of his authority, and obey the instructions of the principal, except where such instructions are unlawful (*Smart v. Sandars*, 1846, 3 C. B. 380; *Smith v. Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457; *Pariente v. Lubbock*, 1855, 20 Beav. 588; *Bexwell v. Christie*, 1776, Cowp. 395); to exercise his authority in the usual way, and in accordance with any special customs or usages of the business in which he is employed, except so far as such customs or usages are unreasonable, or inconsistent with the express terms of his authority or instructions (*Wiltshire v. Sims*, 1808, 1 Camp. N. P. 258; 10 R. R. 673; *Mallough v. Barber*, 1815, 4 Camp. N. P. 150; *Solomon v. Barker*, 1862, 2 F. & F. 726); to act, in regard to all matters left to his discretion, with the most perfect good faith, and to the best of his judgment, solely for the benefit of the principal (*Gray v. Haig*, 1854, 20 Beav. 219; 22 E. R. 587; *General Exchange Bank v. Horner*, 1869, L. R. 9 Eq. 480; *Pariente v. Lubbock*, 1855, 20 Beav. 588; 52 E. R. 731); to keep the money and property of the principal separate from his own money and property, and from that of other persons (*Lupton v. White*, 1808, 15 Ves. Jun. 432; 33 E. R. 817; 10 R. R. 94; *Guerreiro v. Peile*, 1820, 3 Barn. & Ald. 616; 22 R. R. 500; *Massey v. Banner*, 1820, 1 Jac. & W. 241; 37 E. R. 367; 21 R. R. 150); to keep and preserve, and be constantly ready with, correct accounts of all dealings and transactions in the course of

the agency (*Gray v. Haig*, 1854, 20 Beav. 219; *Pearse v. Green*, 1819, 1 Jac. & W. 135; 37 E. R. 327; 20 R. R. 258; *Turner v. Burkinshaw*, 1867, L. R. 2 Ch. 488); to produce, whenever reasonably called upon by the principal, or by any proper person duly authorised by the principal in that behalf, all accounts and documents in his hands concerning the principal's affairs (*Dadswell v. Jacobs*, 1887, 34 Ch. D. 278); to pay over to the principal, on demand, money received to his use (*Harsant v. Blaine*, 1887, 56 L. J. Q. B. 511; *Pearse v. Green*, 1819, 1 Jac. & W. 135; 20 R. R. 258); and to exercise due skill, care, and diligence in the execution of his authority (*Beal v. South Devon Rly. Co.*, 1864, 3 H. & C. 337).

An agent is not bound to perform a mere gratuitous undertaking; but if he does perform it, he is liable for negligence, or any other breach of duty, in the performance thereof (*Coggs v. Bernard*, 2 Raym. (Ld.) 909; *Balfre v. West*, 1853, 13 C. B. 466; *Elsee v. Gatward*, 1793, 5 T. R. 143).

Duty to Pay over Money received for Principal's Use.—An agent who receives money for the use of his principal is bound to pay it over to the principal, though the contract or transaction in respect of which it is received be void or illegal. Thus, if a turf commission agent makes a bet on behalf of a principal, and wins it, he is bound to pay over the amount of the winnings, if he actually receives them, although, in consequence of the Gaming Act, 1845, the bet is void, and no action could be maintained for the recovery thereof (*Bridger v. Savage*, 1885, 15 Q. B. D. 363). The Gaming Act, 1892, has not affected this principle (*De Mattos v. Benjamin*, 1894, 63 L. J. Q. B. 248). So, if money is paid to an agent in respect of an illegal transaction, he is bound to pay it over to the principal, provided that the contract of agency is not itself unlawful (*Bousfield v. Wilson*, 1846, 16 Mee. & W. 185; *Farmer v. Russell*, 1798, 1 Bos. & Pul. 296; *Tenant v. Elliott*, 1797, 1 Bos. & Pul. 3; 4 R. R. 755; *Booth v. Hodgson*, 1795, 6 T. R. 405). Where, however, money has been obtained by an agent wrongfully, or has otherwise been paid to him under such circumstances that he is bound to return it, and he returns it accordingly, he is no longer answerable to the principal in respect thereof, because it thereupon ceases to be money received to the principal's use (*Murray v. Mann*, 1848, 2 Ex. Rep. 538; 76 R. R. 686; *Shee v. Clarkson*, 1810, 12 East, 507; 11 R. R. 473). Where an agent receives money to the use of two or more principals jointly, it is his duty to account to them jointly, and he is not bound to pay over or account for any part of the money to any of the principals, without the consent of them all, whatever may be the rights or shares of the principals as between themselves (*Hatsall v. Griffith*, 1834, 2 C. & M. 679; *Heath v. Chilton*, 1844, 12 Mee. & W. 632; 67 R. R. 447). In accounting for money received to his principal's use, an agent is entitled to take credit for all just allowances (*Dale v. Sollet*, 1767, 4 Burr. 2133), and all sums expended by him with the consent or subsequent acquiescence of the principal, even if they were expended for an unlawful purpose (*Bayntun v. Cattle*, 1833, 1 Moo. & R. 265). Where, however, an agent is authorised to expend money for an unlawful purpose, such authority may be revoked at any time before he has actually paid the money away (*Bone v. Ekless*, 1860, 5 H. & N. 925; *Taylor v. Bowers*, 1876, 1 Q. B. D. 291).

Duty to Exercise due Skill, Care, and Diligence.—The degree of skill, care, and diligence which an agent is bound to exercise in the execution

of his authority depends upon whether he is acting gratuitously or for valuable consideration, and upon the nature of the agency. An agent who acts gratuitously is bound to exercise such skill as he actually possesses, and such care and diligence as he is in the habit of exercising in regard to his own affairs; but he is not liable for mere want of skill, except for the want of such skill as he holds himself out as possessing, or as a person in his situation may reasonably be expected to possess (*Moffatt v. Bateman*, 1869, L. R. 3 P. C. 115; *Wilson v. Brett*, 1843, 11 Mee. & W. 113; 63 R. R. 528; *Whitehead v. Greetham*, 1825, 2 Bing. 464; *Dartnall v. Howard*, 1825, 4 Barn. & Cress. 345). Where a general merchant undertook, without reward, to enter at the custom-house a parcel of goods belonging to A., together with a parcel of his own, and he entered both parcels under a wrong denomination, in consequence of which the goods were seized, it was held that as he had taken the same care of A.'s goods as of his own, and was not of a profession or employment from which skill was necessarily implied, he was not liable to A. for the loss (*Shiells v. Blackburne*, 1789, 1 Black. (H.) 159; 2 R. R. 750). An agent acting for reward is bound to exercise such a degree of skill, care, and diligence as is usual in the ordinary course of the business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him (*Beal v. South Devon Rly. Co.*, 1864, 3 H. & C. 337; *Solomon v. Barker*, 1862, 2 F. & F. 726; *Harmer v. Cornelius*, 1858, 5 C. B. N. S. 236; *Massey v. Banner*, 1820, 1 Jac. & W. 241; 37 E. R. 367; 21 R. R. 150; *Reeve v. Palmer*, 1859, 5 C. B. N. S. 84). What is the usual or a reasonable degree of skill, care, and diligence is a question of fact, depending upon the nature of the agency, and the other circumstances of the particular case. It is the duty of a patent agent to know the law relating to the practice of obtaining patents (*Lee v. Walker*, 1872, L. R. 7 C. P. 121), and of an insurance broker to know what provisions are usually inserted in policies which he undertakes to effect (*Mallough v. Barber*, 1815, 4 Camp. N. P. 150). So, an insurance broker is bound to exercise reasonable diligence in effecting an insurance which he has undertaken (*Turpon v. Bilton*, 1843, 5 Man. & G. 455; see also *Bousfield v. Cresswell*, 1810, 2 Camb. N. P. 545; 11 R. R. 794), and if he is unable to insure according to his instructions, to give notice of that fact to the principal (*Callander v. Oelricks*, 1839, 5 Bing. N. C. 58; 50 R. R. 602). Where a house-agent was paid a commission of 5 per cent. for letting houses, it was left to the jury to say whether he did not undertake to exercise reasonable care to ascertain whether the tenants were solvent, and they found that he did (*Hayes v. Tindall*, 1861, 1 B. & S. 296). On the other hand, it is not the duty of a broker to inspect goods bought by him as such, in order to ascertain whether they are in accordance with the contract, because it is not usual for a broker, in the ordinary course of his business, to do so (*Zwischenbart v. Alexander*, 1860, 1 B. & S. 234). Nor, where a broker is appointed to act as arbitrator in the event of a dispute between the principals, is he bound to exercise any skill in order to come to a correct conclusion, because it is not part of a broker's ordinary business to act as an arbitrator (*Pappa v. Rose*, 1872, L. R. 7 C. P. 32, 525). See also cases cited *infra*, under *Liability of Agent for Negligence and Breach of Duty*.

Estoppel of Agent.—Where goods or chattels are intrusted to an agent by his principal, or an agent acknowledges the title of his principal to goods or chattels in his possession, the agent is not, as a general rule, permitted to deny, as between himself and the principal, that the

principal is the owner of the goods or chattels, nor to set up, as against the principal, the title of any third person thereto (*Dixon v. Hammond*, 1819, 2 Barn. & Ald. 310; *Roberts v. Ogilby*, 1821, 9 Price Ex. 269; 23 R. R. 671; *Scott v. Crawford*, 1842, 4 Man. & G. 1031; 61 R. R. 750; *Zulueta v. Vinent*, 1851, 1 De G., M. & G. 315; 42 E. R. 573; *Green v. Maitland*, 1842, 4 Beav. 524; 49 E. R. 442). There is, however, an exception to this rule. An agent may set up the title of a third person who has a right to the goods or chattels as against the principal, subject to the following conditions—(1) the agent must not have had notice of the claim of such third person at the time when he received the goods or chattels, and must not have elected to treat the principal as the owner thereof after receiving such notice (*Ex parte Davies*, 1881, 19 Ch. D. 86); (2) the agent must have delivered up the goods or chattels to such third person, or must defend for him and on his behalf, and by his authority (*Biddle v. Bond*, 1865, 6 B. & S. 225; *Ross v. Edwards*, 1895, 73 L. T. 100; *Rogers v. Lambert*, [1891] 1 Q. B. 318; *Thorne v. Tilbury*, 1858, 3 H. & N. 534).

The possession of property by an agent is deemed to be the possession of the principal, as evidence of title (*Hitchings v. Thompson*, 1850, 5 Ex. Rep. 50; *Last v. Dinn*, 1859, 28 L. J. Ex. 94), and for the purpose of the acquisition of title by the operation of the Statute of Limitations (*Cooper v. De Tastet*, 1829, Tam. 177; 48 E. R. 71; *A.-G. v. Corporation of London*, 1849, 2 Mac. & G. 247; *Ward v. Carttar*, 1869, L. R. 1 Eq. 29). An agent who is permitted to occupy premises belonging to the principal can acquire no title by means of such occupation, even if he uses the premises for an independent business of his own (*White v. Bayley*, 1861, 10 C. B. N. S. 227). In *Lyell v. Kennedy*, 1889, 14 App. Cas. 437, where an agent continued for many years after the death of his principal intestate, to receive the rents of properties belonging to the principal, it was held that he was not entitled to set up the Statute of Limitations, in an action by the assignee of the heir-at-law for the recovery of the properties and an account of the rents and profits. On the other hand, a principal may acquire a good prescriptive title by virtue of the possession of his agent, even as against the agent himself. In *Williams v. Potts*, 1871, L. R. 12 Eq. 149, where an agent received the rents of certain property for more than twenty years, and duly paid them over to the principal, it was held that in the absence of fraud, the principal had thereby acquired a good prescriptive title, even though the agent was the true owner of the property.

Duties arising from Fiduciary Nature of the Relationship.—The relationship of principal and agent is one involving confidence, and it is the duty of every agent to act with the most perfect good faith towards his principal, and not in any way to abuse the confidence reposed in him. If an agent acquires materials or information in the course of his employment, he will not be permitted, even after the termination of the agency, to use such materials or information in any manner prejudicial to the interests of the principal, without the principal's consent (*Robb v. Green*, [1895] 2 Q. B. 315; *Louis v. Smellie*, 1895, 73 L. T. 226; *Lamb v. Evans*, [1893] 1 Ch. 218). If an agent, being employed to purchase property, purchases it on his own behalf, and it is conveyed or transferred to him, he is a trustee thereof for the principal (*Lees v. Nuttall*, 1834, 2 Myl. & K. 819; 39 E. R. 1157; 31 R. R. 99; *Austin v. Chambers*, 1837, 6 Cl. & Fin. 1; 7 E. R. 598). As to the agent's right to plead the 7th section of the Statute of Frauds in such a case, see

Bartlett v. Pickersgill, 1 Cox, 15; 1 R. R. 1; *James v. Smith*, [1891] 1 Ch. 384; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. Other duties of an agent arising from the fiduciary character of the relation are to make full and fair disclosure when he has a personal interest in any transaction entered into by him, or when he deals with the principal, and to account for all secret benefits and profits acquired in the course or by means of the agency (as to this see *post*).

Duty to Disclose Personal Interest.—It is the duty of an agent to use his best endeavours to promote the interests of his principal; and no agent will be permitted to enter into any transaction in which he has a personal interest in conflict with such duty, except with the consent of the principal, given after all the material circumstances, and the exact nature and extent of the interest of the agent, have been fully disclosed to him (*Rothschild v. Brookman*, 1831, 5 Bli. N. S. 165; 5 E. R. 273; 30 R. R. 147; *Parker v. McKenna*, 1874, L. R. 10 Ch. 96; *Aberdeen Rly. Co. v. Blaikie*, 1854, 2 Eq. Rep. 1281; *Tyrrell v. Bank of London*, 1862, 10 H. L. C. 26; 11 E. R. 934). An agent for the sale of property is not permitted to purchase it himself, nor is an agent for purchase permitted to buy his own property, or property in which he has an interest, on behalf of the principal, except after a full disclosure to the principal of the circumstances; and it is immaterial whether the price paid or charged is a fair one or not (*Lowther v. Lowther*, 1806, 13 Ves. 95, 102; 33 E. R. 230; *Massey v. Davies*, 1794, 2 Ves. Jun. 317; 30 E. R. 651; 2 R. R. 218; *Bentley v. Craven*, 1853, 18 Beav. 75; 52 E. R. 29; *Rothschild v. Brookman*, 1831, 5 Bli. N. S. 165; 5 E. R. 273; 30 R. R. 147; *Great Luxembourg Rly. Co. v. Magnay*, 1858, 25 Beav. 586; 53 E. R. 761). Where any transaction is entered into in violation of this rule, the principal, upon discovery of the circumstances, may repudiate the transaction, or may affirm it and recover from the agent any profit made by him in respect thereof (*Rothschild v. Brookman*, *supra*; *Bentley v. Craven*, *supra*; *Cavendish-Bentinck v. Fenn*, 1886, 12 App. Cas. 652). In *Oliver v. Court*, 1820, 8 Price Ex. 127; 22 R. R. 720, where an auctioneer, who was employed to sell an estate, purchased it himself, the sale was set aside after an interval of thirteen years. In *Salomans v. Pender*, 1865, 3 H. & C. 639, an agent for the sale of land sold it to a company in which he was a shareholder, and it was held that the sale was not binding on the principal, and that though he affirmed it, he was not liable to pay the agent's commission on the sale. [See also *Andrews v. Ramsay*, [1903] 2 K. B. 635.] In *Gillett v. Peppercorne*, 1840, 3 Beav. 78; 49 E. R. 31; 52 R. R. 38, where a stockbroker, who was employed to purchase shares, purchased them from a person who held them as trustee for himself, the transaction was set aside after an interval of many years, without any inquiry as to whether the price was an unfair one. Where an agent has any personal interest in a sale or purchase negotiated by him, it is his duty to disclose all the circumstances, and the exact nature and extent of his interest. It is not sufficient for him to merely disclose that he has an interest, or to make such statements as would put the principal on inquiry. The burden of proving full disclosure lies, in all cases, upon the agent or other person seeking to uphold the transaction in question (*Dunne v. English*, 1874, L. R. 18 Eq. 524; *Ex parte Huth*, *In re Pemberton*, 1840, Mont. & Chit. 667). A custom of a particular trade or business, whereby an agent for sale may purchase the property himself, in the event of his being unable to find a purchaser at an adequate price, is unreasonable, and such a

transaction is not binding on the principal, unless he had notice of the custom, and agreed to be bound thereby, at the time when he gave the authority to the agent (*Hamilton v. Young*, 1881, L. R. 7 Ir. 289; *Rothschild v. Brookman*, 1831, 5 Bli. N. S. 165; 5 E. R. 273; 30 R. R. 147; *De Bussche v. Alt*, 1877, 8 Ch. D. 286). Any custom or usage which has the effect of converting an agent into a principal, or otherwise giving him an interest at variance with his duty, is unreasonable (*Robinson v. Mollett*, 1874, L. R. 7 H. L. 802; *Williamson v. Barbour*, 1877, 9 Ch. D. 529).

Duty of Agent dealing with Principal.—It is the duty of an agent, if he enters into any contract or transaction with his principal, or with his principal's representative in interest, to act with the most perfect good faith, and fully disclose all material circumstances, and everything known to him respecting the subject-matter of the contract or transaction which would be calculated to influence the conduct of the principal or his representative in interest; and whenever the validity of any such contract or transaction is in question, the burden of proving that full disclosure was made, and that no advantage was taken by the agent of his position, or of the confidence reposed in him, lies on the agent (*Molony v. Kernan*, 1842, 2 Dr. & War. 31; 59 R. R. 635; *Charter v. Trevelyan*, 1842, 11 Cl. & Fin. 714; 8 E. R. 1273; 65 R. R. 305; *M'Pherson v. Watt*, 1877, 3 App. Cas. 254; *Savery v. King*, 1856, 5 H. L. C. 627; 10 E. R. 1046; *Collins v. Hare*, 1828, 2 Bli. N. S. 106; 4 E. R. 1071; *Ward v. Sharp*, 1883, 53 L. J. Ch. 313). In *Gwatkin v. Campbell*, 1854, 1 Jur. N. S. 131, a bank manager, who was permitted to carry on a separate business of his own, made advances for the purposes of such business, upon bills which he did not indorse, and it was held that he must make good to his principals a loss suffered through the insolvency of the parties to the bills, on the ground that he ought not to have granted himself the accommodation without previously disclosing to the principals all the circumstances. So if an agent buys property, or takes a lease, from his principal, or, being employed in the management of trust property, buys part of the property from a *cestui-que trust*, it is his duty to fully disclose to the principal or *cestui-que trust* everything known to him respecting the property which increases its value (*Selsey v. Rhoades*, 1824, 2 Sim. & St. 41; 57 E. R. 260; 25 R. R. 150; *King v. Anderson*, 1874, 8 Ir. Eq. 147; *Luddy's Trustees v. Peard*, 1886, 33 Ch. D. 500). Where the articles of association of a company provided that the directors might contract with the company upon disclosing their interest, it was held that they must disclose the full extent and exact nature of their interest, not merely that they had an interest (*Imperial Credit Co. v. Coleman*, 1873, L. R. 6 H. L. 189). The right of a principal to rescind or set aside a transaction entered into with his agent, on the ground of want of disclosure or good faith on the part of the agent, may, however, be lost by acquiescence or delay. The principal must take proceedings to enforce his rights within a reasonable time after the circumstances become known to him (*Wentworth v. Lloyd*, 1864, 10 H. L. C. 589; 11 E. R. 1154; *De Montmorency v. Devereux*, 1840, 7 Cl. & Fin. 188; *Flint v. Woodin*, 1852, 9 Hare, 618; 68 E. R. 660; *Clanricarde v. Henning*, 1860, 30 L. J. Ch. 865).

Duty to Account for Secret Profits.—An agent is not permitted, unless with the knowledge and consent of his principal, to acquire any personal benefit or profit in the course or by means of the agency (*Parker v. McKenna*, 1874, L. R. 10 Ch. 96; *Morison v. Thompson*, 1874, L. R.

9 Q. B. 480; *Imperial Credit Co. v. Coleman*, 1873, L. R. 6 H. L. 189); [*Grant v. Gold Exploration Syndicate*, [1900] 1 K. B. 233. But where an agent contracts with his principal (in case of dismissal), under forfeiture of a fixed sum, as liquidated damages, not to represent a similar enterprise to that in which his principal is engaged in a given locality for a given time, upon breach of agreement the principal cannot obtain both an injunction and the amount of liquidated damages, but must make his election between the two (*General Accident Insurance Corporation v. Noel*, [1902] 1 K. B. 380)]. If an agent purchases charges on his principal's estates, or debts owing by the principal, he is deemed to purchase them as trustee for the principal, and is therefore only entitled to recover from the principal the amount actually paid for the charges or debts, with interest (*Reed v. Norris*, 1837, 2 Myl. & Cr. 361, 374; 40 E. R. 678; 45 R. R. 88; *Carter v. Palmer*, 1841, 8 Cl. & Fin. 657; 8 E. R. 256; 54 R. R. 145; *Hobday v. Peters*, 1860, 28 Beav. 349; 54 E. R. 400). And whenever an agent, in the course or by means of the agency, acquires any benefit or profit without the consent of the principal, such benefit or profit is deemed to be received for the principal's use, and the value or amount thereof must be accounted for and paid over to the principal (*De Bussche v. Alt*, 1877, 8 Ch. D. 286; *Thompson v. Meade*, 1891, 7 T. L. R. 698; *Morison v. Thompson*, 1874, L. R. 9 Q. B. 480; *Kimber v. Barber*, 1872, L. R. 8 Ch. 56). [Cp. *Lister & Co. v. Stubbs*, [1890] 45 Ch. D. 1; *Powell & Thomas v. Evan Jones & Co.*, [1905] 1 K. B. 11; *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671 (sale by agent of goods of rival trader in breach of duty to sell only principal's goods).] Thus, where a shipmaster, being authorised to employ the ship to the best advantage, and not being able to procure remunerative freight, loaded her with a cargo of his own, it was held that he must account to the owners for the profit made by the sale of the cargo, and not merely for reasonable freight (*Shallcross v. Oldham*, 1862, 2 John. & H. 609; 70 E. R. 1202; cp. *Kirkham v. Peel*, 1881, 44 L. T. 195). So, if a managing owner of a ship supplies provisions for the ship, he will only be permitted to charge cost prices, unless the other part-owners consent, with a full knowledge of the circumstances, to pay profit prices (*Ritchie v. Couper*, 1860, 28 Beav. 344; 54 E. R. 398; see also *Williamson v. Hine*, [1891] 1 Ch. 390). On the same principle, a director of a company is bound to account to the company for any profit or benefit acquired by him in the course of conducting its business, or by means of his connection with the company, unless it was acquired with the knowledge and sanction of the shareholders (*Gaskell v. Chambers*, 1858, 26 Beav. 360; 53 E. R. 937; *General Exchange Bank v. Horner*, 1869, L. R. 9 Eq. 480; *Mann v. Edinburgh Tramway Co.*, 1892, 9 T. L. R. 102; *Archer's Case*, [1892] 1 Ch. 322; *Benson v. Heathorn*, 1842, 1 Y. & C. C. 326; 62 E. R. 909; 57 R. R. 351). It is immaterial that, in acquiring the benefit or profit, the agent incurred a risk of loss (*Williams v. Stevens*, 1866, L. R. 1 P. C. 352), and that the principal has suffered no injury (*Parker v. McKenna*, 1874, L. R. 10 Ch. 96). [Cp. *Shipway v. Broadwood*, [1899] 1 Q. B. 369, in which it was held that the inducement of a secret bribe avoids a purchase, even although the advice given by the agent to his principal was given *bonâ fide*. In cases "where the buyer elects not to rescind the sale, but can point to a specific or liquidated sum over and above what must be taken between the parties to be the real price, which has found its way into the vendor's pocket as a result of a sale so effected," the purchaser is entitled to recover it back from the seller

(*Hovenden v. Millhoff*, 1900, 83 L. T. 43); nor is it necessary, in order thus to recover back the specific sum paid as a secret commission or bribe, by a seller to the agent of the buyer, for the purchaser to prove that the sum so paid was in fact added to the price charged for the commodity (*Cohen v. Kuschke & Co.*, 1900, 83 L. T. 102). Cp. *Rowland v. Chapman*, [1901] W. N. 153.] Where, however, the principal knows that the agent is accustomed to receive remuneration from third persons, and does not choose to inquire what is the amount thereof, he cannot, because he is under a misapprehension as to the amount, claim that any part of the remuneration is a profit acquired without his consent (*Great Western Insurance Co. v. Cunliffe*, 1869, L. R. 9 Ch. 525; *Baring v. Stanton*, 1876, 3 Ch. D. 502).

[As to the right of an agent who has made a secret profit to retain his commission, cp. *Andrews v. Ramsay*, [1903] 2 K. B. 635, and *Hippisley v. Knee Brothers*, [1905] 1 K. B. 1; *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671, from which it seems to result that where the transactions between a principal and his agent are, and in some of them the agent has been, honest, while in others he has been dishonest, he is entitled to his commission in all the former, but not in all the latter cases; see also the Prevention of Corruption Act, 1906.]

Liability of Agent for Negligence and Breach of Duty.—An agent is liable to make good to his principal any loss suffered in consequence of the agent's omission to exercise such skill, care, and diligence in the performance of the contract of agency as it is his duty to exercise, or in consequence of any other breach of duty on his part, provided that the loss is such as would be likely, in the ordinary course of things, to result from the breach of duty, or is such as, under the circumstances of the particular case, he might reasonably expect to result therefrom (*Cassaboglou v. Gibb*, 1882, 11 Q. B. D. 797; *Fisher v. Val de Travers Co.*, 1876, 1 C. P. D. 511; *Maydew v. Forrester*, 1814, 5 Taun. 615; 15 R. R. 597; *Mainwaring v. Brandon*, 1818, 2 Moo. K. B. 125; 19 R. R. 497; [*Salvesen & Co. v. Rederi Aktiebolaget Nordstjernen*, [1905] A. C. 302]). Where an agent was instructed to warehouse the principal's goods at a particular place, and he warehoused a portion of them at another place, where they were destroyed, it was held that the loss was a natural consequence of his disobedience to the instructions, and that he was liable to make it good, though he had not been guilty of negligence (*Lilley v. Doubleday*, 1881, 7 Q. B. D. 510). So, if an agent, being instructed to insure goods, omits to do so, or omits to disclose material facts known to him, in consequence of which the principal fails to recover on the policy, the agent is liable to the same extent as the underwriters would have been if he had duly and effectually insured the goods (*Smith v. Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457; *Smith v. Price*, 1862, 2 F. & F. 748; *Tickel v. Short*, 1750, 2 Ves. 239; 28 E. R. 154; *Maydew v. Forrester*, 1814, 5 Taun. 615; 15 R. R. 597). So, where an agent was instructed not to part with the possession of certain goods until they were paid for, and he delivered them to the purchaser, who failed to pay for them, it was held that the agent was liable to the principal for the full value of the goods (*Stearine Co. v. Heintzmann*, 1864, 17 C. B. N. S. 56; see also *Papé v. Westacott*, [1894] 1 Q. B. 272). An auctioneer, however, is not liable for accepting, in disobedience to the instructions of his principal, the highest *bona-fide* bid at a sale without reserve, because such instructions are unlawful, and it is, therefore, not the duty of the auctioneer to obey them (*Bexwell v. Christie*, 1776, Cowp. 395). If an agent pays his

principal's money into his own account at the bank, he is answerable for the failure of the banker, though acting gratuitously, because it is his duty to pay it into a separate account (*Wren v. Kirton*, 1805, 11 Ves. Jun. 377; 32 E. R. 1133; 8 R. R. 174; *Massey v. Banner*, 1820, 1 Jac. & W. 241; 37 E. R. 367; 21 R. R. 150).

In *Solomon v. Barker*, 1862, 2 F. & F. 726, a broker had omitted to make an estimate of the value of goods which he was authorised to sell, it being usual in the business to make such an estimate; in *Stumore v. Breen*, 1886, 12 App. Cas. 698, a shipmaster had signed a bill of lading which was incorrectly dated; and in *Hibbert v. Bayley*, 1860, 2 F. & F. 48, an auctioneer had permitted a purchaser to go away without paying a deposit; and in each case the agent was held liable to the principal in an action for negligence. On the other hand, an agent is not liable for loss incurred, where he has strictly followed the instructions of the principal (*Pariente v. Lubbock*, 1855, 8 De G., M. & G. 5; 44 E. R. 290; *Warwicke v. Noakes*, 1790, 1 Pea. 98; 3 R. R. 653), or has acted in accordance with usage, and in the ordinary course of business (*Russell v. Hankey*, 1794, 6 T. R. 12; 3 R. R. 102; *Lambert v. Heath*, 1846, 15 Mee. & W. 486; *Mitchell v. Newhall*, 1846, 15 Mee. & W. 308; *Moore v. Mourgue*, 1776, Cowp. 479), or has exercised his best judgment in a matter of a purely discretionary nature (*Comber v. Anderson*, 1808, 1 Camp. N. P. 523; *Cullerne v. London and Suburban Building Society*, 1890, 25 Q. B. D. 485). Nor, where an agent is clearly authorised to do a particular act, which is in itself imprudent, is he liable for loss suffered by the principal in consequence of the imprudent nature thereof (*Overend v. Gibb*, 1872, L. R. 5 H. L. 480). [An agent is not bound to meet consequences which are not contemplated in the contract, and the probability of which is as well known to his principal as to himself (*Commonwealth Portland Cement Co. v. Weber, Lohmann & Co.*, [1905] A. C. 66).]

An agent is only liable, in an action for breach of duty, to make good such loss as he might reasonably have expected to result from the breach of duty (*In re United Service Co., Johnston's Claim*, 1870, L. R. 6 Ch. 212; *Boyd v. Fitt*, 1864, 11 L. T. 280), and it must be a loss which is recognised by law. If an agent is employed to make a wagering or unlawful contract, he is not liable for neglecting to do so, because the principal would be unable to enforce such a contract, and he is therefore not deemed to have suffered any loss in consequence of the breach of duty, and it is immaterial that it is customary in the business to fulfil such a contract without action (*Cohen v. Kittell*, 1889, 22 Q. B. D. 680; *Webster v. De Tastet*, 1797, 7 T. R. 157; 4 R. R. 402).

Liability of Agent accepting a Bribe.—Where an agent accepts any money or property in the course of his agency by way of a bribe, he is liable to account for the amount or value thereof as money received for the use of the principal, with interest at the rate of 5 per cent. per annum from the date of the receipt of the bribe, whether he was induced to depart from his duty to the principal or not (*Mayor of Salford v. Lever*, [1891] 1 Q. B. 168; *Phosphate Sewage Co. v. Hartmont*, 1877, 5 Ch. D. 394; *Hay's Case*, 1875, L. R. 10 Ch. 593); and if the property has fluctuated in value, it must be accounted for at its highest value while in the possession of the agent (*McKay's Case*, 1875, 2 Ch. D. 1; *Pearson's Case*, 1877, 5 Ch. D. 336; *Metcalfe's Case*, 1879, 13 Ch. D. 169; *Weston's Case*, 1879, 10 Ch. D. 579). Where the agent is induced by the bribe to depart from his duty to the principal, he is also liable, jointly and severally with the person bribing him, to make good the loss suffered by

the principal in consequence of the breach of duty, without taking into consideration the amount paid over to the principal as money received to his use (*Mayor of Salford v. Lever*, [1891] 1 Q. B. 168). The acceptance of a bribe by an agent justifies dismissal without notice (*Boston Fishing Co. v. Ansell*, 1888, 39 Ch. D. 339). An agent is not, however, a trustee for his principal in respect of money received as a bribe, and the principal is not entitled to follow it as trust money. The relation between them is that of debtor and creditor, not that of trustee and *cestui-que trust* (*Lister v. Stubbs*, 1890, 45 Ch. D. 1); and the right of the principal to sue for the bribe is barred by the Statute of Limitations, in equity as well as at law, after the expiration of six years from the time when he becomes aware of the bribery (*Metropolitan Bank v. Heiron*, 1880, 5 Ex. D. 319). [See also the Prevention of Corruption Act, 1906.]

Right of Agent to Commission or Remuneration.—The right of an agent to commission or remuneration for his services may be founded upon either an express or an implied contract. The mere employment of a commission agent, or other person who is accustomed to undertake agency business for reward, such as an auctioneer, or factor, or broker, is sufficient to raise a presumption of an intention to pay him the usual and customary charges; and a contract to do so will always be implied from such an employment, unless the circumstances are such as clearly to show that, in the particular case, it was not intended that he should receive remuneration (*Miller v. Beale*, 1879, 27 W. R. 403; *Manson v. Baillie*, 1855, 2 Macq. H. L. Cas. 80). A contract to pay remuneration will not, however, be implied merely because services are rendered by an agent, unless the circumstances of the case are such as to indicate an intention to remunerate him (*Taylor v. Brewer*, 1813, 1 M. & S. 290; 21 R. R. 831; *Roberts v. Smith*, 1859, 4 H. & N. 315; *Reeve v. Reeve*, 1858, 1 F. & F. 280; cp. *Bryant v. Flight*, 1839, 5 Mee. & W. 114; *Jewry v. Busk*, 1814, 5 Taun. 302).

Where express provision is made by the contract of agency as to the remuneration of the agent, his rights with respect thereto must be ascertained exclusively from the terms of the contract. Thus, where it was provided that an agent should receive commission on "all sales effected or orders executed by him," and by the custom of the trade commission was not payable in respect of bad debts, it was held that he was, nevertheless, entitled to commission upon the sales resulting in bad debts, because the custom was inconsistent with the terms of the contract (*Bower v. Jones*, 1831, 8 Bing. 65). So, if an agent is employed to find a purchaser for property, and it is provided that he shall be paid a certain commission in the event of success, he has no claim for a *quantum meruit*, in the absence of success, because such a claim is excluded by the express contract (*Green v. Mules*, 1861, 30 L. J. C. P. 343; *Barnett v. Isaqueson*, 1888, 4 T. L. R. 645; *McLeod v. Artola*, 1889, 6 T. L. R. 68). So, if it is provided that the commission shall be paid when a certain stage in the negotiations has been reached, as for instance, when the abstract of conveyance has been delivered, or the purchase-money paid, or the transaction completed, the agent cannot claim the commission until that stage has been reached (*Alder v. Boyle*, 1847, 4 C. B. 635; *Bull v. Price*, 1831, 5 Moo. & P. 2; *Benningfield v. Kynaston*, 1887, 3 T. L. R. 279; *Didcott v. Friesner*, 1896, 11 T. L. R. 187; *Lott v. Orthwaite*, 1893, 10 T. L. R. 76), though he may be entitled to damages for wrongfully preventing him from earning his commission, if the transaction goes off owing to the

default of the principal (*Prickett v. Badger*, 1856, 1 C. B. N. S. 296; *Roberts v. Barnard*, 1884, 1 C. & E. 336). Where there is no express agreement as to the remuneration of the agent, and the circumstances of the case are such that a contract to remunerate him may be implied, the extent of the remuneration, and conditions under which it becomes payable, must be ascertained from the custom or usage of the particular trade or business (*Read v. Rann*, 1830, 10 Barn. & Cress. 438; 34 R. R. 473; *Broad v. Thomas*, 1830, 7 Bing. 99; 33 R. R. 399; *Cohen v. Paget*, 1814, 4 Camp. N. P. 96; *Rucker v. Lunt*, 1863, 3 F. & F. 959; *Baring v. Stanton*, 1876, 3 Ch. D. 502). In the absence of any special custom or usage, the implied contract is to pay reasonable remuneration for the services rendered (*Jeuery v. Busk*, 1814, 5 Taun. 302; *Bryant v. Flight*, 1839, 5 Mee. & W. 114).

Where the remuneration of an agent is, by agreement or usage, a commission upon transactions brought about by him, he is only entitled to be paid commission in respect of such transactions as are the direct result of his agency (*Gibson v. Crick*, 1862, 1 H. & C. 142; *Toulmin v. Millar*, 1887, 58 L. T. 96; *Curtis v. Nixon*, 1871, 24 L. T. 706; *Bray v. Chandler*, 1856, 18 C. B. 718; *Bayley v. Chadwick*, 1878, 39 L. T. 429; *Antrobus v. Wickens*, 1865, 4 F. & F. 291). Thus, where it was agreed that an agent should be paid 5 per cent. commission upon the amount of capital introduced by him into a business, and he procured a loan of £10,000, in respect of which he was paid commission, and subsequently the principal and the lender entered into partnership, the lender subscribing a further £4000 by way of capital, it was held that the agent was not entitled to commission in respect of the £4000, because that amount was advanced in consequence of the negotiations for a partnership, with which the agent had nothing to do (*Tribe v. Taylor*, 1876, 1 C. P. D. 505). But it is not necessary that the agent should be acting for the principal at the time of the completion of the transaction. It is sufficient if his introduction is the direct cause of the negotiations from which the transaction ultimately results, though his authority be revoked before completion, and the transaction be completed through the intervention of another agent (*Green v. Bartlett*, 1863, 14 C. B. N. S. 681; *Mansell v. Clements*, 1874, L. R. 9 C. P. 139; *Wilkinson v. Martin*, 1837, 8 Car. & P. 1; cp. *Taplin v. Barrett*, 1889, 6 T. L. R. 30). And where the commission is payable upon the performance of a definite undertaking, and the agent substantially performs that undertaking, he is entitled to be paid the commission, even if the transaction goes off, and the principal acquires no benefit from his services, provided that it does not go off in consequence of the agent's default. Thus, if an agent is employed to procure a loan, and introduces to his principal a person who is able and willing to lend the amount required, so that nothing further remains for the agent to do, he is, in the absence of agreement or custom to the contrary, entitled to his commission, though the negotiations afterwards fall through in consequence of circumstances over which he has no control (*Green v. Lucas*, 1876, 33 L. T. 584; *Fisher v. Drewett*, 1879, 48 L. J. Ex. 32; *Fuller v. Eames*, 1892, 8 T. L. R. 278; cp. *Salter's Claim*, 1891, 7 T. L. R. 602; *Peacock v. Freeman*, 1888, 4 T. L. R. 541). So, where it was agreed that an agent should receive commission upon all goods bought through him, it was held that he was entitled to commission upon orders obtained by him and accepted by the principal, though the principal was unable to execute the orders, and therefore acquired no benefit from them (*Lockwood v. Levick*, 1860, 8 C. B. N. S. 603). So, where

it is from agreed that an agent shall be paid a certain commission in the event of his finding a purchaser for property, it is sufficient, as a general rule, if he procures a complete and binding contract which is accepted by the principal, though the transaction is never completed (*Horford v. Wilson*, 1807, 1 Taun. 12; *Lara v. Hill*, 1863, 15 C. B. N. S. 45; *Hill v. Kitching*, 1846, 3 C. B. 299; *Rimmer v. Knowles*, 1874, 30 L. T. 496; cp. *Clack v. Wood*, 1882, 9 Q. B. D. 276; *Grogan v. Smith*, 1890, 7 T. L. R. 132). See also ESTATE AND HOUSE AGENT.

Damages for wrongfully preventing Agent from earning Remuneration.—Where a principal, in breach of the contract of agency, by his own act or default prevents the agent from earning his remuneration, the agent is entitled to damages; and if nothing further remains to be done by the agent under the contract of agency, the measure of damages is the full amount that he would have earned if the principal had duly carried out the contract (*Roberts v. Barnard*, 1884, 1 C. & E. 336; *Harris v. Petherick*, 1878, 39 L. T. 543; *Turner v. Goldsmith*, [1891] 1 Q. B. 544; cp. *Rhodes v. Forwood*, 1876, 1 App. Cas. 256). In *Prickett v. Badger*, 1856, 1 C. B. N. S. 296, an agent was employed to find a purchaser for certain property at a fixed price, and it was agreed that he should be paid commission in the event of a sale being effected. The agent found a purchaser at the price fixed, but the principal refused to complete the transaction, and it was held that the agent was entitled to recover, by way of damages, the full amount of the commission which he would have earned if the transaction had been duly completed. In *Inchbald v. Western Neilgherry Coffee Co.*, 1864, 17 C. B. N. S. 733, the defendant company had employed the plaintiff, a broker, to dispose of its shares, and had agreed to pay him £100 down, and a further £400 on the allotment of all the shares, and it was held, the company having voluntarily wound up after the disposal of a considerable number of the shares, and thus prevented the plaintiff from earning the £400, that he was entitled to recover such damages for the breach of contract as the jury thought reasonable (see also *Dean and Gibbert's Claim*, 1872, 41 L. J. Ch. 476; *Ex parte Clark*, 1869, L. R. 7 Eq. 550; and cp. *Ex parte Maclure*, 1870, L. R. 5 Ch. 737). A principal, however, in the absence of agreement to the contrary, is entitled to revoke the authority of an agent at any time before it is completely exercised, and if he does so, the question whether the agent has a right to be remunerated for the work done prior to the revocation, depends upon the intention of the parties, to be ascertained from the terms of the contract of agency and circumstances of the particular case (*Simpson v. Lamb*, 1856, 17 C. B. 603; *Noah v. Ewen*, 1886, 2 T. L. R. 364).

Unlawful and Gaming Transactions.—An agent cannot recover remuneration in respect of any transaction which he knows to be unlawful, or in respect of any gaming or wagering transaction. Thus, a broker cannot recover commission for effecting an illegal insurance (*Allkins v. Jupe*, 1877, 2 C. P. D. 375), or in respect of an illegal sale of offices (*Stackpole v. Erle*, 1761, 2 Wils. 133), whether the claim is founded on an express or an implied promise (*Waldo v. Martin*, 1825, 4 Barn. & Cress. 319; 28 R. R. 289; *Parsons v. Thompson*, 1790, 1 Black. (H.) 322; 2 R. R. 773). This principle, however, only applies where the transaction is obviously unlawful, or is known to be so by the agent (*Haines v. Busk*, 1814, 5 Taun. 521). Prior to the Gaming Act, 1892, 55 Vict. c. 9, the fact that a contract was a gaming or wagering contract constituted no defence to an action for commission in respect thereof,

such contracts not being unlawful, but merely void (*Knight v. Fitch*, 1855, 15 C. B. 566). That Act, however, provides that any promise express or implied, to pay any sum by way of commission, fee, or reward or otherwise, in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, 8 & 9 Vict. c. 109, or of any services in relation thereto or connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum.

Effect of Misconduct or Breach of Duty.—An agent has no right of remuneration in respect of any services from which, in consequence of his negligence or other breach of duty, the principal derives no benefit (*Hamond v. Holiday*, 1824, 1 Car. & P. 384; *Hill v. Featherstonhaugh*, 1831, 7 Bing. 569; 33 R. R. 576; *Bracey v. Carter*, 1840, 12 Ad. & E. 373; 54 R. R. 575; *Dalton v. Irwin*, 1830, 4 Car. & P. 289). In *Denew v. Daverell*, 1813, 3 Camp. N. P. 451, where an auctioneer, who was employed to sell an estate, negligently omitted to insert in the conditions a proviso usually inserted therein, and in consequence of the omission the sale was rendered nugatory, it was held that he was not entitled to any remuneration whatever for his services, though the conditions of the sale had been submitted to the principal, and he had made no objection to them. Nor is an agent entitled to remuneration in respect of anything done by him in excess of his authority, or after the revocation of his authority, unless the principal ratifies it (*Toppin v. Healey*, 1863, 11 W. R. 466; *Marsh v. Jelf*, 1862, 3 F. & F. 234; *Keay v. Fenwick*, 1876, 1 C. P. D. 745). In *Gillow v. Aberdare*, 1893, 9 T. L. R. 12, an agent, who was employed to let or sell a house, having procured a tenant, entered into negotiations for a sale, and subsequently found a purchaser, and it was held that he was not entitled to commission on the sale, because his authority expired as soon as he had let the house. In *Campanari v. Woodburn*, 1854, 15 C. B. 400, where an agent, who was employed to sell a picture on the terms that he should be paid a fixed commission of £100 in the event of success, "no sale, no pay," sold the picture after the death of the principal, it was held that, though the executors confirmed the sale, they were not liable to pay the agreed commission, unless they ratified and recognised the terms of the agent's employment, though they were liable to pay him reasonable remuneration for the services performed. Where an agent enters into a transaction in which he has a personal interest in conflict with his duty, the principal is not liable to pay remuneration in respect of such transaction, even if he elects to affirm it (*Salomans v. Pender*, 1865, 3 H. & C. 639; *Gray v. Haig*, 1854, 20 Beav. 219; 52 E. R. 587). The right of an agent to remuneration may be forfeited by his neglect to keep regular and proper accounts, or by his wilful misconduct or breach of duty (*White v. Lincoln*, 1803, 8 Ves. Jun. 363; 32 E. R. 395; 7 R. R. 71; *White v. Chapman*, 1815, 1 Stark. N. P. 113; *Hurst v. Holding*, 1810, 3 Taun. 32; 12 R. R. 587).

Rights of Reimbursement and Indemnity.—Every agent has by implication of law, as incidental to the contract of agency, a right to be indemnified by the principal against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the lawful and proper performance of the contract of agency (*Thacker v. Hardy*, 1878, 4 Q. B. D. 685; *Toplis v. Grane*, 1839, 5 Bing. N. C. 636; 50 R. R. 814; *Pawle v. Gunn*, 1838, 4 Bing. N. C. 445; 44 R. R. 755; *Campbell v. Larkworthy*, 1894, 9 T. L. R. 528; *Hooper v. Treffrey*, 1847, 1 Ex. Rep. 17; 74 R. R. 578). Thus, if the principal revokes the authority of an agent after he

has incurred expenses or liabilities in endeavouring to execute it, the principal must repay the agent the amount of the expenditure, or indemnify him against the liabilities (*Warlow v. Harrison*, 1858, 1 El. & El. 295, 309; *Brittain v. Lloyd*, 1845, 14 Mee. & W. 762; 69 R. R. 816; *Simpson v. Lamb*, 1856, 17 C. B. 603). So, if an agent defends an action on his principal's behalf, he is entitled to be indemnified against any damages and costs incurred, provided he was acting within the scope of his authority in defending the action, and the loss was not due to his own negligence or default (*Frixione v. Tagliaferro*, 1855, 10 Moo. P. C. 175; 14 E. R. 459; *In re Wells*, 1895, 72 L. T. 359). In *Pettman v. Keble*, 1850, 9 C. B. 701, where an agent, exercising his best judgment, compromised an action brought against him in respect of a contract made on behalf of the principal, it was held that he was entitled to indemnity, though the plaintiff could not, under the circumstances, have succeeded in the action; the principal having had notice of the action, and not having given any instructions as to the course to be pursued. The right of indemnity extends to all liabilities, and not merely actual losses, incurred by the agent. [The true owner of goods who instructs an auctioneer to sell them is not bound to indemnify the auctioneer, who, while acting on the instructions, is sued and cast in damages on a claim by a third person of which the true owner has no notice (*Halbronn v. International Horse Agency and Exchange*, [1903] 1 K. B. 270).] Where a stockbroker incurred liabilities on his principal's behalf, and subsequently paid a composition on the amount of such liabilities, amongst other debts, it was held that the principal must indemnify him to the full extent of the liabilities, although, by a regulation of the Stock Exchange, the broker could not be sued for the balance of his debts without the permission of the committee (*Lacey v. Hill Crowley's Claim*, 1870, L. R. 18 Eq. 182). Where the loss or liability is incurred in pursuance of a regulation, custom, or usage of the particular market or business in which the agent is authorised to deal, the question whether he is entitled to indemnity or not depends upon whether such regulation, custom, or usage is a reasonable one, or the principal has notice thereof. If the regulation or custom is an unreasonable one, the agent is not entitled to indemnity, unless the principal knew of its existence, and agreed to be bound by it, at the time when he conferred the authority on the agent; if it is a reasonable one, the principal must indemnify the agent, whether he had notice of it or not (*Sentance v. Hawley*, 1863, 13 C. B. N. S. 458; *Harker v. Edwards*, 1887, 57 L. J. Q. B. 147; *Smith v. Reynolds*, 1892, 66 L. T. 808; *Sutton v. Tatham*, 1839, 10 Ad. & E. 27; *Blackburn v. Mason*, 1893, 9 T. L. R. 286; *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802. See also BROKER). An agent who makes advances to or on account of his principal has a right of action, as well as a lien, for such advances; but a *del credere* agent cannot sue for advances which are covered by sums of which he has guaranteed payment to the principal (*Graham v. Ackroyd*, 1852, 10 Hare, 192).

Unlawful and Gaming Transactions.—An agent can have no right of reimbursement or indemnity, whether by virtue of an express or an implied promise, in respect of any act or transaction which he knows to be unlawful [(*Levy v. Warburton*, [1901] 70 L. J. K. B. 708)], or in respect of any transaction rendered null and void by the Gaming Act, 1845. Thus, where an agent expended money on his principal's behalf in purchasing shares in an illegal company, it was held that he was not

entitled to recover from the principal the amount so expended, because the transaction was obviously unlawful (*Josephs v. Pebrer*, 1825, 3 Barn. & Cress. 639). So, if a broker effects an illegal insurance, he cannot recover from the principal the amount of the premiums, or any other payment made in respect of the insurance (*Allkins v. Jupe*, 1877, 2 C. P. D. 375). So, if an agent knowingly purchases and pays for smuggled goods on his principal's behalf, he cannot recover the price from the principal, even if the principal obtains possession of the goods (*Ex parte Mather*, 1797, 3 Ves. Jun. 373; 30 E. R. 1060). This principle, however, applies only when the transaction is obviously, or to the agent's knowledge, unlawful (*Adamson v. Jarvis*, 1827, 4 Bing. 66; *Betts v. Gibbons*, 1834, 2 Ad. & E. 57; 41 R. R. 381). With regard to gaming transactions, it was held, prior to the Gaming Act, 1892, that where an agent was employed to make a bet in his own name on the principal's behalf, he had implied authority to pay the amount of the bet if he lost it, and that such authority became irrevocable, as being coupled with an interest, as soon as the bet was made, if the agent would suffer loss of credit in his business or other actual damage in the event of the bet not being paid (*Read v. Anderson*, 1884, 13 Q. B. D. 779). The Gaming Act, 1892, 55 Vict. c. 9, however, provides that any promise, express or implied, to pay any person any sum paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, shall be null and void, and no action shall be brought or maintained to recover any such sum (see *Tatam v. Reeve*, [1893] 1 Q. B. 44; *Knight v. Lee*, [1893] 1 Q. B. 41).

Losses caused by Own Default.—An agent's right of indemnity does not extend to losses suffered in consequence of his own negligence, default, or breach of duty (*Toplis v. Grane*, 1839, 5 Bing. N. C. 636; *Simpson v. Swan*, 1812, 3 Camp. N. P. 291; 13 R. R. 805; *Frixione v. Tagliaferro*, 1856, 10 Moo. P. C. 175; 14 E. R. 459; *Skyring v. Greenwood*, 1825, 4 Barn. & Cress. 281; 28 R. R. 264; *Capp v. Topham*, 1805, 6 East, 392; *Lewis v. Samuel*, 1846, 8 Q. B. 685; 70 R. R. 582). If an agent enters into any transaction, or does any act, in excess of his authority, he has no right to be indemnified against any losses, or reimbursed any expenses, incurred in respect of such act or transaction, unless it is ratified by the principal (*Coates v. Pacey*, 1892, 8 T. L. R. 474; *Service v. Bain*, 1893, 9 T. L. R. 95; *Barron v. Fitzgerald*, 1840, 6 Bing. N. C. 201). In *Warwick v. Slade*, 1811, 3 Camp. N. P. 127; 13 R. R. 772, a broker was employed to effect a policy of marine insurance, and after the underwriters had signed the slip, but before the policy was effected, the principal revoked his authority. The broker, nevertheless, effected the policy and paid the premiums. It was held that as, in consequence of the Marine Insurance Act, 1867, ss. 7 and 9, the contract of insurance was not binding until the underwriters had subscribed the policy, the broker was not entitled to recover the amount of the premiums from the principal, the policy having been effected and the premiums paid without authority. So, where a broker sold shares on behalf of his principal, and, in consequence of the non-delivery of the shares, the buyer bought other shares at a higher price without having tendered a transfer, and the broker paid the difference, notwithstanding express instructions from the principal not to do so, it was held that the principal was not liable to pay the difference to the broker, because the buyer could not have recovered the amount until a transfer had been tendered by him, and the payment by the broker was therefore unauthor-

rised (*Bowlby v. Bell*, 1846, 3 C. B. 284; *Howard v. Tucker*, 1831, 1 Barn. & Adol. 712; 35 R. R. 418). Where an outside broker, being instructed to buy and sell various stocks, without the consent of the principal appropriated to the principal's account certain stocks held by himself, and from time to time sold and repurchased other stocks bought on the principal's behalf, it was held that he was not entitled to recover from the principal any losses in respect of the stocks so appropriated or dealt with in breach of his duty (*Shelton v. Wood*, 1895, 71 L. T. 616). So, where a stockbroker, who was instructed to carry over certain stock to the next settlement, became insolvent and was declared a defaulter before the settling day, in consequence of which the stock was sold at a loss, it was held that the principal was not liable to indemnify the broker against the loss, because it was caused by the broker's own default (*Duncan v. Hill*, 1873, L. R. 8. Ex. 242; see also *Ellis v. Pond*, [1898] 1 Q. B. 426).

Right of Lien.—The nature and extent of the lien of an agent upon the goods and chattels of his principal depend upon the terms of the contract of agency, and the usage or custom of the trade or business in which the agent is employed. It may be a general lien in respect of all claims arising in the course of the agency, or a particular lien confined to claims arising in respect of the particular goods or chattels subject to the lien. A general lien can only arise by agreement, either express, or implied from a course of dealing between the principal and agent, or from an established custom or usage (see POSSESSORY LIEN). The lien of an agent, whether general or particular, is confined to claims arising in the course of the agency (*Houghton v. Matthews*, 1803, 3 Bos. & Pul. 485; 7 R. R. 815; *In re Taylor*, [1891] 1 Ch. 590; *In re Galland*, 1885, 31 Ch. D. 296), and, except in the case of the maritime lien of a shipmaster (see MARITIME LIEN), and charging lien of a solicitor (see SOLICITOR), extends only to goods and chattels in the possession of the agent (*Taylor v. Robinson*, 1818, 2 Moo. K. B. 730; *Kinloch v. Craig*, 1790, 3 T. R. 119, 783; 1 R. R. 664). Constructive possession is, however, sufficient (*Bryans v. Nix*, 1839, 4 Mee. & W. 775; 51 R. R. 810); and an agreement made for valuable consideration, to hand over a bill of lading to an agent in order that he may have a lien on the goods represented thereby, gives him, in equity, a right to the possession of the goods as against the principal (*Ex parte Barber*, 1843, 3 M. D. & D. G. 174). It is necessary that the possession of the goods or chattels should be obtained by the agent lawfully, and in the same capacity in which the lien is claimed. An agent has no lien upon property of which he obtains possession by misrepresentations (*Madden v. Kempster*, 1807, 1 Camp. N. P. 12), or of which he obtains possession without the authority of the principal (*Walshe v. Provan*, 1853, 1 Com. L. R. 823; *Gibson v. May*, 1853, 4 De G., M. & G. 512; 43 E. R. 607; *Wickens v. Townshend*, 1830, 1 Russ. & M. 361), or in some other capacity than that in which he claims the lien (*Dixon v. Stansfeld*, 1850, 10 C. B. 398; *Muir v. Fleming*, 1823, Dow. & Ry. N. P. 29; 25 R. R. 775; *R. v. Sankey*, 1836, 5 Ad. & E. 423; *Champernown v. Scott*, 1821, 6 Madd. 93; 56 E. R. 1026; 22 R. R. 248; *Pelly v. Wathen*, 1849, 1 De G., M. & G. 16; 42 E. R. 457). Nor can an agent claim any right of lien which is inconsistent with an agreement between him and the principal (*Walker v. Birch*, 1795, 6 T. R. 258; *Cowell v. Simpson*, 1809, 16 Ves. Jun. 280; 33 E. R. 989; 10 R. R. 181; *Bock v. Gorrisen*, 1861, 30 L. J. Ch. 39), or which is inconsistent with the express purpose for which the goods or chattels were entrusted to

him (*Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787; 8 E. R. 1622; 69 R. R. 204; *Frith v. Forbes*, 1862, 4 De G., F. & J. 409; 45 E. R. 1242; *Burn v. Brown*, 1817, 2 Stark. N. P. 272; 19 R. R. 719). An agent's lien is *prima facie* not confined to debts due to him from the principal, but extends to the agent's claim for indemnity against liabilities incurred in the course of the agency, and to all other claims arising in the course of the agency, or in respect of the particular goods, as the case may be (*Foxcraft v. Wood*, 1828, 4 Russ. 487; 38 E. R. 888; 28 R. R. 161; *In re Faucus, Ex parte Buck*, 1876, 3 Ch. D. 795; *Hammonds v. Barclay*, 1802, 2 East, 227; *Drinkwater v. Goodwin*, 1775, Cowp. 251; *In re Parry's Fabric Co.*, 1876, 1 Ch. D. 631).

As to how the lien of an agent may be extinguished or lost, and how far it is effective as against third persons, and as to possessory liens generally, see POSSESSORY LIEN.

PRINCIPAL AND THIRD PERSONS.

Actual and Ostensible Authority.—Third persons who deal with an agent, without notice of the actual limits of his authority, are entitled to assume that his actual authority is coextensive with his ostensible authority. A principal, therefore, whether disclosed or undisclosed (*Watteau v. Fenwick*, [1893] 1 Q. B. 346), is not only bound by such acts as are within the scope of the agent's actual authority, express or implied, but also by every act done by the agent in the course of his employment, which is apparently or ostensibly within the scope of his authority, provided that the person dealing with him has no notice that in doing such act he is exceeding his actual authority (*Hazard v. Treadwell*, 1730, 1 Stra. 506; *Heyworth v. Knight*, 1864, 17 C. B. N. S. 298; *Waller v. Drakeford*, 1853, 1 El. & Bl. 749; *Ex parte Dixon*, 1876, 4 Ch. D. 133). On the other hand, a principal is not bound by any act which is neither apparently nor actually within the scope of the agent's authority (*Stubbing v. Heintz*, 1791, 1 Pea. 66; 3 R. R. 651; *Fitzgerald v. Dressler*, 1859, 7 C. B. N. S. 374), nor by any act which is not done in the course of the agent's employment on his behalf (*McGowan v. Dyer*, 1873, L. R. 8 Q. B. 141). Thus, if an agent is held out by his principal as having authority to enter into a compromise, or do any other act, on the principal's behalf, but is given special instructions not to compromise for less than a certain amount, or not to do such act except on certain conditions, the principal will be bound though the agent disobey such instructions, provided that the person dealing with him has no notice thereof (*Trickett v. Tomlinson*, 1863, 13 C. B. N. S. 663; *Beaufort v. Neeld*, 1845, 12 Cl. & Fin. 248; 8 E. R. 1399; *National Bolivian Nav. Co. v. Wilson*, 1880, 5 App. Cas. 176, 209; *Smith v. McGuire*, 1858, 3 H. & N. 554). So, where an agent is employed to carry on a business, and it is incidental to the ordinary conduct of such a business to buy goods on credit, or to accept bills of exchange, the principal is liable in respect of goods bought, or bills accepted, by the agent, although by the contract of agency it was agreed that he should not pledge the principal's credit, the persons dealing with him having no notice of such agreement (*Edmunds v. Bushell*, 1865, L. R. 1 Q. B. 97; *Watteau v. Fenwick*, [1893] 1 Q. B. 346; *Hawken v. Bourne*, 1841, 8 Mee. & W. 703; 58 R. R. 853). Otherwise, if the contract or transaction in question is outside the ordinary course of the business, when carried on in the usual way (*Simpson's Case*, 1887, 36 Ch. D. 532).

Where the act done by the agent is not within the usual scope of the authority of such an agent, the principal is not bound, unless the agent was in fact authorised to do the act (*Xenos v. Wickham*, 1866, L. R. 2 H. L. 296). Thus, an insurance company is not bound by a contract to grant a policy, made without its authority by a local agent, nor by the unauthorised acceptance by such an agent of a premium after the time for payment of such premium has expired (*Linford v. Provincial Insurance Co.*, 1864, 34 Beav. 291; 55 E. R. 647; *Acey v. Fernie*, 1840, 7 Mee. & W. 151; 56 R. R. 671; cp. *Wing v. Harvey*, 1854, 5 De G., M. & G. 265; 43 E. R. 872; *In re Economic Fire Office*, 1896, 12 T. L. R. 142). So, if a stockbroker sells stock on credit, the principal is not bound, unless he expressly authorised a sale on credit (*Wiltshire v. Sims*, 1808, 1 Camp. N. P. 258; 10 R. R. 673). So, if it is usual in the particular trade or business to impose a certain restriction or limitation on the authority of an agent, and such a restriction or limitation is imposed in the particular case, the principal is not bound by any act of the agent done in contravention thereof (*Daun v. Simmins*, 1879, 41 L. T. 783; *Baines v. Ewing*, 1866, L. R. 1 Ex. 320). Where, however, an agent was authorised, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business, it was held that a person lending money to the agent on such exceptional terms was not bound to inquire whether, in the particular case, the emergency had arisen, provided he acted in good faith, and without notice that the agent was departing from the terms of his authority (*Montaigniac v. Shitta*, 1890, 15 App. Cas. 347; see also *Bryant v. Quebec Bank*, [1893] A. C. 179).

[Where a party, without any qualification or limitation as to his authority so to do, makes a contract as agent in the name of a disclosed principal, he impliedly contracts with the other party to the agreement that he has authority from the alleged principal to make the contract. And should the third party to whom he makes such representation enter into the contract in reliance on his statement, and it subsequently turns out that he was unauthorised to bind his alleged principal, he is personally liable in an action on such implied contract (*Halbot v. Lens*, [1901] 1 Ch. 344). And a similar rule applies where a person signs a contract in his own name without qualification; such unqualified signature raising a presumption in law that he is contracting personally, and not as an agent on behalf of his principal (*Stewart v. Shannessy*, 1900, 2 F. 1288). "But if a person who deals with an agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under such circumstances the agent would not be liable" (*Halbot v. Lens*, [1901] 1 Ch. 344, at p. 351). Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted *bonâ fide*, repudiate liability on the ground that the agent in making it acted in his own interests and not in those of the principal (*Hambro v. Burnand*, [1904] 2 K. B. 10; [1903] 2 K. B. 399).]

Doctrine of "Holding Out."—If a person by his conduct represents, or permits it to be represented, that another person is his agent, he will not be permitted to deny the agency with respect to any person dealing with the ostensible agent on the faith of any such representation (*Maddick v. Marshall*, 1864, 17 C. B. N. S. 829; *Summers v. Solomon*, 1857,

26 L. J. Q. B. 301). Thus, where a purchaser of hemp had the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase, and whose ordinary course of business it was to buy and sell hemp, it was held that the purchaser was bound by an unauthorised sale of the hemp by the broker, and by his receipt of the price, because, by permitting the broker to have the custody of the hemp, he had held him out as having authority to sell it and receive the proceeds (*Pickering v. Busk*, 1812, 15 East, 38; 13 R. R. 364; *Dyer v. Pearson*, 1824, 3 Barn. & Cress. 38; 27 R. R. 286). So, if A. permits B. on several occasions to buy goods on his credit from C., and pays for them, and C. on a subsequent occasion supplies goods to B. on A.'s credit, B. having in fact been previously given the money to pay for the goods, or having no authority to buy them on A.'s behalf, it is a question of fact whether A. by his conduct held out B. as having authority to buy the goods on his credit, and if he did, he is liable to C. for the price (*Hazard v. Treadwell*, 1730, 1 Stra. 506; *Todd v. Robinson*, 1825, 1 Ry. & M. 217; *Gilman v. Robinson*, 1825, 1 Ry. & M. 226; 28 R. R. 795; *Trueman v. Loder*, 1840, 11 Ad. & E. 589; 52 R. R. 451; *Llewellyn v. Winckworth*, 1845, 13 Mee. & W. 598; 67 R. R. 751; *Prescott v. Flynn*, 1832, 9 Bing. 19; 35 R. R. 508). On the same principle, a company is bound by the acts of *de facto* directors, though they have not been properly appointed, provided that the persons dealing with them act in good faith and without notice of any irregularity (*Mahony v. East Holyford Mining Co.*, 1875, L. R. 7 H. L. 869; *In re County Life Assurance Co.*, 1870, L. R. 5 Ch. 288; *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93).

[As to certification of transfers, see COMPANY, Vol. III., at p. 314.

Where a principal, who is the owner of real estate, gives instruction to his agent to dispose of the property to a buyer at a specified price, such an authority entitles the agent to make a binding contract of sale, and includes an authorisation to sign an agreement (*Rosenbaum v. Belson*, [1900] 2 Ch. 267); although an instruction from a landlord to an agent to let property does not, as a rule, confer an authority on the agent (not being a solicitor) to negotiate the terms of the lease. Where an owner of property, for a specific and limited purpose, clothes an agent or third party with the apparent ownership and right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee had paid him the consideration for it, he is estopped from asserting his title as against a person to whom such agent or third party has disposed of the property, and who took it in good faith and for value (*Rimmer v. Webster*, [1902] 2 Ch. 163, at p. 173; [see also *Burgis v. Constantine*, 1908, 24 T. L. R. 267]). The rule of law governing such cases being that whenever one of two innocent persons must suffer by the fraudulent acts of a third person, he who has enabled such third person to occasion the loss must sustain it; provided that the act which is relied upon as having enabled the third party to occasion the loss is one so far connected with the fraud causing the loss that it may reasonably be looked upon as bringing about that fraud (*Farquharson Bros. v. King & Co.*, [1901] 2 K. B. 697, A. L. Smith, M.R., at p. 708, C. A.; *Union Credit Bank v. Mersey Dock Board*, [1899] 2 Q. B. 205). And a similar principle of law applies in cases where a seller of goods sends to his buyer, under cover of a letter, a bill of lading; the Court of Appeal in *Cahn v. Pockett's Bristol Channel Steam Packet Co.* ([1899] 1 Q. B. 643) deciding that a buyer can keep the bill of lading, although refusing to

accept the draft, and give a good title, to the chattels covered thereby, to a sub-purchaser from him who takes in good faith and without notice of the want of authority of the buyer to deal with the bill of lading and the goods which it represents.]

Factors Act.—The FACTORS ACTS (*q.v.*) are a series of statutes passed for the protection of persons dealing in good faith with factors and other mercantile agents intrusted with the possession of goods, or of the documents of title to goods, and not having notice of the extent of the agent's authority. The former enactments were all repealed, and their provisions consolidated and amended, by the Factors Act, 1889, which is now, therefore, the only statute in force on the subject. For the purposes of the Act the expression "mercantile agent" means a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods; the expression "goods" includes wares and merchandise (but not certificates of stock, *Freeman v. Appleyard*, 1862, 32 L. J. Ex. 175); the expression "document of title" includes any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented; the expression "pledge" includes any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability (see *Jewan v. Whitworth*, 1866, L. R. 2 Eq. 692; *Sheppard v. Union Bank*, 1862, 7 H. & N. 661; *Portalis v. Tetley*, 1867, L. R. 5 Eq. 140); and a person is deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody, or are held by any other person subject to his control or for him or on his behalf (s. 1).

Sec. 2 provides that—(1) Where a mercantile agent is, with the consent [(see *Oppenheimer v. Frazer & Wyatt*, [1907] 1 K. B. 519; 2 K. B. 50; *Oppenheimer v. Attenborough & Sons*, [1908] 1 K. B. 221)] of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of the Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. (2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent. (3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of the Act, be deemed to be with the consent of the owner. (4) For the purposes of the Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Sec. 3 provides that a pledge of the documents of title to goods shall be deemed to be a pledge of the goods. Sec. 4, that where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge. Sec. 5, that the consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of the Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged, in excess of the value of the goods, documents, or security when so delivered or transferred in exchange. Sec. 6, that for the purposes of the Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Sec. 7 provides that where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person; but nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

Secs. 8, 9, and 10 refer to dispositions by sellers and buyers of goods, and are reproduced in the Sale of Goods Act, 1893. See SALE OF GOODS.

Sec. 11 provides that for the purposes of the Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to bearer, then by delivery. Sec. 12, that nothing in the Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing; or shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged, any balance of money remaining in his hands as the produce of the sale of the goods, after deducting the amount of his lien; or shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent. Sec. 13, that the provisions of the Act shall be construed in amplification, and not in derogation, of the powers exercisable by an agent independently of the Act.

The Factors Act applies only to dispositions made by mercantile agents, and made in the ordinary course of their business as such agents. Where a wine merchant's clerk, who was permitted to have the possession of warrants for wine belonging to his master, fraudulently pledged the warrants, it was held that the pledge was not protected by the Factors Acts, because the clerk was not a mercantile agent within the meaning of the Acts (*Lamb v. Attenborough*, 1862, 1 B. & S. 831). [The words "when acting in the ordinary course of business of a mercantile agent" mean acting as a mercantile agent would act if the particular transaction were authorised by the principal (*Oppenheimer v. Attenborough & Son*, [1908] 1 K. B. 221). In that case it was also held that a pledge of diamonds by a diamond broker was valid under sec. 2 of the Factors Act, 1889, although in the diamond trade there is a custom that brokers have no authority to pledge diamonds entrusted to them.] So, where an agent, who was employed on commission to sell jewellery by retail, fraudulently pledged some of the jewellery with a pawnbroker, it was held that the transaction was not within the Factors Act, because the pledge was not made in the ordinary course of the business of a mercantile agent (*Hastings v. Pearson*, [1893] 1 Q. B. 62). So, where advances were made upon the furniture in a house which an agent occupied with the consent of the owner of the furniture, the person making the advances believing the agent to be the owner thereof, it was held that the transaction was not within the scope of the Factors Acts then in force (*Wood v. Rowcliffe*, 1846, 6 Hare, 191). Nor does the Act apply unless the agent obtains or has possession of the goods or documents of title with the consent of the owner (see *Vaughan v. Moffat*, 1868, 38 L. J. Ch. 144; [*Oppenheimer v. Frazer & Wyatt*, [1907] 2 K. B. 50]). As to when a person is deemed not to have acted in good faith and without notice that the agent has not authority to make the disposition, see *Gobind Chunder Sein v. Ryan*, 1861, 9 Moo. Ind. App. 140; 19 E. R. 695; *Navulshaw v. Brownrigg*, 1852, 2 De G., M. & G. 441; 42 E. R. 943; *Learoyd v. Robinson*, 1844, 12 Mee. & W. 745; 67 R. R. 470.

Dealings with Money and Negotiable Securities.—Where an agent pays or negotiates money or negotiable securities for valuable consideration, and the person taking the same acts in good faith, and without notice of any want of authority on the part of the agent, such payment or negotiation is as valid and binding on the owner of the money or securities as if it had been made by his express authority; and for this purpose an antecedent debt or liability of the agent is a sufficient valuable consideration (*London Joint-Stock Bank v. Simmons*, [1892] A. C. 201; *Goodwin v. Roberts*, 1876, 1 App. Cas. 476; *Rumball v. Metropolitan Bank*, 1877, 2 Q. B. D. 194). This is an instance of the application of the wider rule of law, that every person who takes money or a negotiable instrument for valuable consideration and in good faith, and who has no notice of any defect in the title of the person from whom he takes it, acquires a good title thereto. A person is deemed to act in good faith, within the meaning of this rule, if he in fact acts honestly, whether he acts negligently or not (*Bills of Exchange Act*, 1882, s. 90; *Jones v. Gordon*, 1877, 2 App. Cas. 616). In *London Joint-Stock Bank v. Simmons*, [1892] A. C. 201, a broker fraudulently pledged with his banker negotiable securities belonging to various principals, as security for an advance to himself, the banker taking them in good faith, but without making any inquiry as to whether the securities were the property of the broker, or whether he had authority

to pledge them, and it was held that the principals were bound by the pledge (cp. *Sheffield v. London Joint-Stock Bank*, 1888, 13 App. Cas. 333, where a money-lender pledged securities deposited with him by his customers). In *Marten v. Rocke*, 1885, 53 L. T. 946, where an auctioneer, whose account at the bank was overdrawn, paid in the proceeds of certain sales, it was held that the banker was entitled, as against the principal, to retain in payment of the overdraft the amounts so paid in, though the banker knew that the moneys were substantially the proceeds of sales. Otherwise, if the auctioneer had, to the knowledge of the banker, been committing a breach of trust in paying the moneys into his own account. [As to the equitable right of the lender of money borrowed by an agent in excess of authority, but applied in payment of the principal's debts, to recover from the principal, see *Bannatyne v. Maciver*, [1906] 1 K. B. 103.]

Notice of Want of Authority.—No act done by an agent beyond the scope of his actual authority is binding on the principal with respect to any person having notice that in doing such act the agent was exceeding or departing from his authority. Thus, if an agent pledges goods upon which he has a lien, to a person who has notice that he has no authority to pledge them, the transaction is not protected by the Factors Act, and the pledgee has no right to retain the goods, as against the principal, even to the extent of the lien of the agent (*McCombie v. Davies*, 1805, 7 East, 5; 8 R. R. 524; *Daubigny v. Duval*, 1794, 5 T. R. 604). This principle extends to cases where an agent deals in an unauthorised manner with money or negotiable instruments intrusted to him; and a restrictive indorsement upon a negotiable instrument operates as notice to all persons taking it, that the holder has no authority to deal with it or its proceeds in a manner inconsistent with the terms of the indorsement (*Litt v. Martindale*, 1856, 18 C. B. 314; *Sigourney v. Lloyd*, 1828, 8 Barn. & Cress. 622; 32 R. R. 504; *Treuttel v. Barandon*, 1817, 8 Taun. 100; 19 R. R. 472; *Steele v. Stuart*, 1866, 14 L. T. 620; *Evans v. Kymer*, 1830, 1 Barn. & Adol. 528; 35 R. R. 368). A signature by procuration on a bill of exchange, promissory note, or cheque operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (Bills of Exchange Act, 1882, s. 25; *Alexander v. Mackenzie*, 1848, 6 C. B. 766; *Stagg v. Elliott*, 1862, 12 C. B. N. S. 373; cp. *Bryant v. Quebec Bank*, [1893] A. C. 179; *Smith v. McGuire*, 1858, 3 H. & N. 554).

Admissions of Agent.—A statement or representation made by an agent is admissible in evidence against the principal, if it was made with the express or implied authority of the principal, or if it was made in the ordinary course of the agent's employment on the principal's behalf, and has reference to some matter or transaction upon which he was employed at the time when the statement or representation was made (*Williams v. Innes*, 1808, 1 Camp. N. P. 364; 10 R. R. 702; *Hood v. Reeve*, 1828, 3 Car. & P. 532; *Standage v. Creighton*, 1832, 5 Car. & P. 406; *Lishman v. Christie*, 1887, 19 Q. B. D. 333; *Biggs v. Lawrence*, 1789, 3 T. R. 454; *Marshall v. Cliff*, 1815, 4 Camp. N. P. 133). But an unauthorised statement or representation of an agent is not evidence against the principal if it was not made in the ordinary course of his employment on the principal's behalf (*Schumack v. Look*, 1825, 10 Moo. K. B. 39; *Garth v. Howard*, 1832, 1 Moo. & S. 628; 34 R. R. 753; *Meredith v. Footner*, 1843, 11 Mee. & W. 202; 63 R. R. 581; *Whitehouse*

v. *Abberley*, 1845, 1 Car. & Kir. 642), or if it has reference to some matter or transaction upon which the agent was not employed at the time when the statement or representation was made (*Fairlie v. Hastings*, 1803, 10 Ves. Jun. 123; 32 E. R. 791; *Peto v. Hague*, 1804, 5 Esp. 134; *Allen v. Denstone*, 1839, 8 Car. & P. 760; *Wagstaff v. Wilson*, 1832, 4 Barn. & Adol. 339; *Snowball v. Goodricke*, 1833, 4 Barn. & Adol. 541). In *Kirkstall Brewery Co. v. Furness Rly. Co.*, 1874, L. R. 9 Q. B. 468, the question was whether a parcel sent by railway had been stolen by one of the company's servants, and it was held that a statement made by the stationmaster to the police as to the absconding porter was admissible in evidence against the company, the statement having been made in the ordinary course of the stationmaster's duty. On the other hand, where a railway company was sued for not delivering certain goods within a reasonable time, and a servant of the company, a week after the alleged cause of action had arisen, in answer to a question as to why he had not sent on the goods, had stated that he had forgotten them, it was held that the admission was not evidence against the company, because it concerned a bygone transaction, upon which the servant was not employed at the time when the admission was made (*Great Western Rly. Co. v. Willis*, 1865, 18 C. B. N. S. 748). If an agent is employed to pay workmen for work done, a promise by him to pay is an admission which can be used against the principal as evidence that the money is due; and such a promise, provided it is in writing and signed by the agent, interrupts the operation in the principal's favour of the Statute of Limitations (*Burt v. Palmer*, 1804, 5 Esp. 145; 9 Geo. IV. c. 14, s. 6; 19 & 20 Vict. c. 97, s. 13). So, a part-payment made by an agent in the ordinary course of his employment interrupts the operation of the statute (*Jones v. Hughes*, 1850, 5 Ex. Rep. 104; cp. *Watson v. Woodman*, 1875, L. R. 20 Eq. 721; *Linsell v. Bonsor*, 1835, 2 Bing. N. C. 241). So, if a wife carries on a business on her husband's behalf, an admission by her as to the state of an account for goods supplied to such business is evidence against the husband; and a written and signed promise by her to pay such an account deprives him of the benefit of the Statute of Limitations (*Anderson v. Sanderson*, 1817, 2 Stark. N. P. 204; 19 R. R. 703; *Emerson v. Blonden*, 1794, 1 Esp. 142; *Palethorp v. Furnish*, 1796, 2 Esp. 511; cp. *Meredith v. Footner*, 1843, 11 Mee. & W. 202; 63 R. R. 581). On the other hand, where a secretary of a tramway company represented that certain money was due from the company, it was held that the company was not bound by the representation, because it was not in the ordinary course of the secretary's employment to make any such representation on the company's behalf (*Barnett v. South London Tram Co.*, 1887, 18 Q. B. D. 815). Statements and reports made by an agent to his principal concerning the principal's affairs are not admissions which can be used by third persons as evidence against the principal (*In re Devala Co., Ex parte Abbott*, 1883, 22 Ch. D. 593; *Langhorn v. Allnutt*, 1812, 4 Taun. 511; 13 R. R. 663; *Reyner v. Pearson*, 1812, 4 Taun. 662; *Kahl v. Jansen*, 1812, 4 Taun. 565). It seems, however, that on this point a contrary practice prevails in the Admiralty Division (see *The Solway*, 1885, 10 P. D. 137, where it was held that a letter from a ship-master to the owners was evidence of the facts therein stated against the owners).

Notice to Agent.—Where knowledge is acquired by an agent in the course of his agency, of any facts or circumstances material to the trans-

action or business in respect of which he is employed, the principal is, as a general rule, deemed to have notice of such facts or circumstances, provided that they are of such a nature that it is the duty of the agent to communicate them to him (*Attwood v. Small*, 1838, 6 Cl. & Fin. 232; 7 E. R. 684; 49 R. R. 115; *Tanham v. Nicholson*, 1872, L. R. 5 H. L. 561; *Graves v. Legg*, 1857, 2 H. & N. 210; *Baldwin v. Casella*, 1872, L. R. 7 Ex. 325; *Brewin v. Briscoe*, 1859, 2 El. & El. 116). Thus, where an agent of an insurance company negotiated a contract of insurance, it was held that the knowledge of the agent that the assured had lost the sight of an eye was equivalent to notice to the company of that fact (*Bawden v. London, etc., Assurance Co.*, [1892] 2 Q. B. 534). So, where a broker bought goods from a factor, it was held that the principal for whom the broker acted must be deemed to have notice that the factor was not selling his own goods, the broker being aware of that fact (*Dresser v. Norwood*, 1864, 17 C. B. N. S. 466). So, where a ship was driven on a rock and damaged, and the master afterwards wrote a letter to the owners, but did not mention the fact that the ship had been damaged, it was held that the owners must be deemed to have had notice of the fact from the time of the receipt of the letter, because it was the duty of the master to have communicated it (*Gladstone v. King*, 1813, 1 M. & S. 35; 14 R. R. 392; see also *Proudfoot v. Montefiore*, 1867, L. R. 2 Q. B. 511; *Fitzherbert v. Mather*, 1785, 1 T. R. 12; 1 R. R. 134). On the other hand, where a broker, who was employed to effect an insurance, acquired knowledge of a material fact, which he did not communicate to his principal, it was held that his knowledge did not operate as notice to the principal of such fact, so as to invalidate a policy subsequently effected by another broker in respect of the same risk, because the employment of a broker to effect an insurance does not make it his duty to communicate material facts coming to his knowledge to the principal, but only to the insurers (*Blackburn v. Vigors*, 1887, 12 App. Cas. 531).

An exception to the general rule, that knowledge acquired by an agent, as such, is imputed to the principal, prevails where the agent is a party to the commission of a fraud upon the principal, the success of which requires the concealment of the facts or circumstances in question (*Cave v. Cave*, 1880, 15 Ch. D. 639; *Kennedy v. Green*, 1834, 3 Myl. & K. 699; 40 E. R. 266; 41 R. R. 176; *Waldy v. Gray*, 1875, L. R. 20 Eq. 238; cp. *Rolland v. Hart*, 1871, L. R. 6 Ch. 678; *Atterbury v. Wallis*, 1856, 25 L. J. Ch. 792; *Boursot v. Savage*, 1866, L. R. 2 Eq. 234). So, where the directors of a company took part in the commission of a misfeasance against the company, it was held that their knowledge did not operate as notice to the company of the misfeasance (*In re Fitzroy Bessemer Steel Co.*, 1844, 50 L. T. 144). The mere fact that the agent has an interest in suppressing his knowledge is not, however, sufficient to prevent such knowledge from being imputed to the principal, if it is the duty of the agent to communicate it (*Thompson v. Cartwright*, 1863, 33 Beav. 178; 55 E. R. 335; *Rolland v. Hart*, *supra*; *Bradley v. Riches*, 1878, 9 Ch. D. 189).

Where the facts coming to the knowledge of the agent are not material to the business for which he is employed (*Wyllie v. Pollen*, 1863, 32 L. J. Ch. 782; *Brittain v. Brown*, 1871, 24 L. T. 504; *Powles v. Page*, 1846, 3 C. B. 16; 71 R. R. 262; *Tate v. Hyslop*, 1885, 15 Q. B. D. 368; *Ex parte Warren*, 1885, 1 T. L. R. 430), or they come to his knowledge otherwise than in the course of his employment on the principal's behalf (*Société Générale de Paris v. Tramways Union Co.*, 1884, 14 Q. B. D.

424; *Ex parte Boulton*, 1857, 1 De G. & J. 163; 44 E. R. 685), the knowledge of the agent does not operate as notice to the principal of such facts. The third section of the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, provides, in favour of purchasers of property for valuable consideration, that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such (see *In re Cousin's Trusts*, 1886, 31 Ch. D. 671), or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Liability of Principal on Agent's Contracts.—A contract made by an agent is, as a general rule, deemed in law to be the contract of the principal by whose authority it is made. A principal, therefore, is generally liable to be sued directly on any contract duly made on his behalf, unless his liability is excluded by the express terms of the contract. This principle applies whether the agent by the contract pledges his own personal credit or not, and whether the principal be disclosed or undisclosed, except in the case of contracts by deed, bills of exchange, promissory notes, and cheques. If the agent contracts personally, the other contracting party may elect to charge either the principal or the agent, but cannot charge them both, on the contract (*Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368). Thus, where a wife carried on a business in her own name on behalf of her husband, and in her own name ordered goods for the purpose of such business, it was held that the husband was liable for the price of the goods (*Petty v. Anderson*, 1825, 3 Bing. 170). So, where an agent buys goods in his own name, and the seller debits him with the price, not knowing that he is acting on behalf of a principal, the seller, upon discovering the principal, may elect to sue either the principal or the agent for the price of the goods (*Thomson v. Davenport*, 1829, 9 Barn. & Cress. 78; 32 R. R. 578; *Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368; *Campbell v. Hicks*, 1858, 28 L. J. Ex. 70). If the contract is made by the agent in his own name, parol evidence is admissible to show who is the real principal, in order to charge him thereon, even though the contract be in writing, such evidence not being inconsistent with the terms of the contract (*Morris v. Wilson*, 1859, 5 Jur. N. S. 168; *Calder v. Dobell*, 1871, L. R. 6 C. P. 486; *Trueman v. Loder*, 1840, 11 Ad. & E. 589; 52 R. R. 451; *Wilson v. Hart*, 1817, 7 Taun. 295). The liability of the principal may, however, be excluded by the terms of the contract. Where the managing part-owner of a ship became a member of a mutual insurance association, and insured the ship under the rules and regulations of such association, and by such rules and regulations the liability for contributions in the nature of premiums was confined to members of the association, it was held that the other part-owners, not being members, could not be sued as undisclosed principals for contributions due in respect of the policy, even if the managing owner failed to pay them, because the liability of the principals was excluded by the terms of the contract (*U. K. Mutual S. S. Association v. Nevill*, 1887, 19 Q. B. D. 110). Otherwise, if the liability had been thrown on the persons assured, without reference to whether they were members or not, or if it had been provided that the persons assured

should be liable as if they were members (*Ocean Iron S. S. Insurance Association v. Leslie*, 1889, 22 Q. B. D. 722; *Great Britain, etc., Insurance Association v. Wyllie*, 1889, 22 Q. B. D. 710). [Where an agent in the due course of his employment makes a payment on account, for and on behalf of the principal, he thereby raises inferentially a promise or engagement that the principal will pay the balance. And such payment on account, if made unconditionally, is sufficient to take the case out of the Statute of Limitations (*In re Hale, Lilley v. Foad*, [1899] 2 Ch. 107).]

Foreign Principals.—An exception to the general rule as to the liability of a principal upon contracts made on his behalf, prevails where the principal is a foreigner. A home agent has *prima facie* no authority to directly pledge the credit of his foreign principal. A foreign principal, therefore, is not liable to be sued on a contract made by his agent in England, unless it is proved that the agent was authorised to establish privity of contract between such principal and the other contracting party, and it clearly appears from the terms of the contract or from the surrounding circumstances that it was the intention of the agent and of the other contracting party that the principal should be liable on the contract (*Smyth v. Anderson*, 1849, 7 C. B. 21; *Paterson v. Gandasequi*, 1812, 15 East, 62; *Malcolm v. Hoyle*, 1893, 63 L. J. Q. B. 1; *Die Elbinger v. Claye*, 1873, L. R. 8 Q. B. 313; *Hutton v. Bulloch*, 1874, L. R. 9 Q. B. 572).

Liability on Bills, Notes, and Cheques.—The doctrine of the liability of an undisclosed principal does not apply to bills of exchange, promissory notes, or cheques (*Ex parte Rayner*, 1868, 17 W. R. 64; *Ducarrey v. Gill*, 1830, Moo. & M. 450). Signature is essential to liability on such an instrument (Bills of Exchange Act, 1882, s. 23), and in determining whether a signature on a bill of exchange is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is adopted (*ibid.*, s. 26 (2)). And no person can be liable as the acceptor of a bill, except the person to whom it is addressed (*Polhill v. Walter*, 1832, 3 Barn. & Adol. 114; 37 R. R. 344; *Davis v. Clarke*, 1844, 6 Q. B. 16; 66 R. R. 255). If, therefore, a bill is addressed to a principal, and it is accepted by his authority, the principal is liable as acceptor, whether the acceptance is in his name or in that of the agent (*Lindus v. Bradwell*, 1848, 5 C. B. 583; 75 R. R. 798; *Jenkins v. Morris*, 1847, 16 Mee. & W. 877; *Okell v. Charles*, 1876, 34 L. T. 822). If, on the other hand, a bill is addressed to an agent, the name of the principal not being mentioned as drawee, the principal is not liable as acceptor, even if it is accepted in his name and by his authority (*Polhill v. Walter*, 1832, 3 Barn. & Adol. 114; 37 R. R. 344). With regard to liability as drawer or indorser of a bill, note, or cheque, or as maker of a note, the rule is a simple one. If the name of the principal is signed, or the signature is expressed to be made on his behalf, by a duly authorised agent, the principal is liable (*Furze v. Sharwood*, 1841, 2 Q. B. 388; *Aggs v. Nicholson*, 1856, 1 H. & N. 165). But he is not liable unless his name appears as the contracting party (*Serrell v. Derbyshire Rly. Co.*, 1850, 9 C. B. 811; *Ducarrey v. Gill*, 1830, Moo. & M. 450).

As to the liability of a principal to be sued on a deed executed on his behalf, see POWER OF ATTORNEY.

Discharge of Principal by Election to charge Agent.—A principal may be discharged from liability upon a contract made on his behalf, by the election of the other contracting party to give exclusive credit to the agent who made the contract. If an agent enters into a contract in

such terms that he is personally liable thereon, and the other contracting party does not know who the principal is, such party may, upon discovering the principal, sue him on the contract, though he originally gave exclusive credit to the agent in the belief that he was contracting on his own behalf, provided that a judgment on the contract has not in the meantime been obtained against the agent (*Thomson v. Davenport*, 1829, 9 Barn. & Cress. 78; 32 R. R. 578; *Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368; *Waring v. Favenck*, 1807, 1 Camp. N. P. 85; 10 R. R. 638; *Campbell v. Hicks*, 1858, 28 L. J. Ex. 70; *Bottomley v. Nuttall*, 1858, 5 C. B. N. S. 122). But if the other contracting party knows at the time when the contract is made, or subsequently discovers, who the principal is, and notwithstanding such knowledge or discovery elects to give exclusive credit to the agent, he cannot, after having made his election, change his mind, and charge the principal on the contract (*Addison v. Gandasequi*, 1812, 4 Taun. 574; 13 R. R. 689; *Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368; *Bentley v. Griffin*, 1814, 5 Taun. 356; *Metcalfe v. Shaw*, 1811, 3 Camp. N. P. 22; 13 R. R. 740). For this purpose there must be actual knowledge who the principal is. The knowledge of an agent or servant is not sufficient (*Dunn v. Newton*, 1884, 1 C. & E. 278). Where a judgment is obtained against the agent, such judgment, though unsatisfied, is, while it subsists, a bar to any proceedings on the contract against the principal (*Priestley v. Fernie*, 1865, 3 H. & C. 977; *Kendall v. Hamilton*, 1879, 4 App. Cas. 504); but if the other contracting party, when he obtained the judgment, did not know that there was a principal, or did not know who the principal was, he may, upon getting the judgment set aside, sue the principal on the contract (*Partington v. Hawthorne*, 1888, 52 J. P. 807). Except where the agent is sued to judgment, which is conclusive evidence in point of law of an election to give exclusive credit to him (*Priestley v. Fernie*, 1865, 3 H. & C. 977), the question whether such an election has been made is a question of fact. In *Calder v. Dobell*, 1871, L. R. 6 C. P. 486, where a broker bought goods and inserted his own name in the sold note as the buyer, and the seller invoiced the goods to him, and called upon him to accept and pay for them, threatening legal proceedings, it was held that the conduct of the seller was not conclusive proof of an election by him to give exclusive credit to the broker, and that whether he had so elected or not was a question for the jury. Nor is such conduct as taking an acceptance from the agent for the amount due, and renewing such acceptance from time to time (*Robinson v. Read*, 1829, 9 Barn. & Cress. 449; *Whitwell v. Perrin*, 1858, 4 C. B. N. S. 412; *The Huntsman*, [1894] P. 214), or proving for the amount against the agent's estate in bankruptcy (*Curtis v. Williamson*, 1874, L. R. 10 Q. B. 57; *Morgan v. Couchman*, 1853, 14 C. B. 100; *Fell v. Parkin*, 1882, 52 L. J. Q. B. 99), conclusive proof of such an election, though of course it is strong evidence thereof.

Settlement by Principal with Agent.—Where an agent buys goods in his own name from a person who gives exclusive credit to him, believing him to be buying on his own account, and the principal in good faith pays the agent for the goods at a time when the seller still continues to give exclusive credit to the agent, believing him to be the principal in the transaction, the principal is discharged from liability to the seller (*Armstrong v. Stokes*, 1872, L. R. 7 Q. B. 598). Subject to this, a principal is not discharged from liability upon a contract made on his behalf, by settling, or otherwise dealing to his detriment, with the agent who made

the contract, unless the other contracting party has by his conduct led the principal to believe that the agent has discharged the liability, or that he has elected to look to the agent alone for the discharge thereof, and the principal settles or otherwise deals to his detriment with the agent in consequence of such belief. In other words, the principal is not discharged by paying or settling with his own agent, unless the conduct of the creditor is such as to estop him, as between himself and the principal, from denying that he has been paid (*Heald v. Kenworthy*, 1855, 10 Ex. Rep. 739; *Davison v. Donaldson*, 1882, 9 Q. B. D. 623; *Dent v. Dunn*, 1812, 3 Camp. N. P. 296; 13 R. R. 809; *Macfarlane v. Giannacopulo*, 1858, 3 H. & N. 860). Thus, if a creditor takes a security from the agent of his debtor, and gives the agent a receipt for the debt, the debtor will be discharged if he deal to his detriment with the agent on the faith of the receipt (*Wyatt v. Hertford*, 1802, 3 East, 147; *Smyth v. Anderson*, 1849, 7 C. B. 21). So, if goods are sold to an agent on cash terms, the seller's omission to enforce cash payment may, under certain circumstances, be calculated to induce a reasonable belief that he has been paid, so as to discharge the principal in the event of his acting to his prejudice on the faith of such a belief (*MacClure v. Schemeil*, 1871, 20 W. R. 168; *Kymer v. Suwercropp*, 1807, 1 Camp. N. P. 109; 10 R. R. 646). But the mere omission to insist upon prepayment in such a case, or mere delay in enforcing payment, or in making application to the principal for payment, is not sufficiently misleading conduct upon which to found an estoppel, unless there are special circumstances rendering such omission or delay misleading in the particular case (*Irvine v. Watson*, 1880, 5 Q. B. D. 102, 414; cp. *Smethurst v. Mitchell*, 1859, 1 El. & El. 623; *Fell v. Parkin*, 1882, 52 L. J. Q. B. 99). In *Davison v. Donaldson*, 1882, 9 Q. B. D. 623, a principal was held not to be discharged by a settlement with his agent, though the creditor made no application to the principal until three years after the debt was contracted, and the agent had in the meantime become bankrupt.

Right of Principal to sue on Agent's Contracts.—The contract of an agent being deemed, as a general rule, to be the contract of the principal by whose authority it is made, it follows that a principal is generally entitled to intervene and sue in his own name upon any contract duly made on his behalf, unless it is inconsistent with the terms of the contract that the principal should have a right of action thereon. Except in the case of contracts by deed, this rule applies notwithstanding that the contract is made in the name of the agent, and the principal is undisclosed and entirely unknown to the other contracting party. Thus, the principal may sue for the price of goods sold by a factor or broker in his own name, though the purchaser believed at the time of the sale that the factor or broker was selling his own goods (*Rabone v. Williams*, 1785, 7 T. R. 360; 4 R. R. 463; *Sadler v. Leigh*, 1815, 4 Camp. N. P. 195; *Cooke v. Eshelby*, 1887, 12 App. Cas. 271). So, where a part-owner of a whaling vessel sold the produce of a voyage in his own name, it was held that the owners of the vessel were entitled to sue jointly for the price, though the purchaser had no knowledge that any other person than the one who made the contract was interested in the goods sold (*Skinner v. Stocks*, 1821, 4 Barn. & Ald. 437; 23 R. R. 337; see also *Cothay v. Fennell*, 1830, 10 Barn. & Cress. 671; 34 R. R. 541). So, if a person carries on business in the name of himself and another person whom he employs as his clerk, he is entitled to sue alone upon a contract made in the name in which the business is carried on

(*Spurr v. Cass*, 1870, L. R. 5 Q. B. 656; *Kell v. Nainby*, 1829, 10 Barn. & Cress. 20). Where an agent enters into a contract, whether verbally or in writing, in his own name, parol evidence may be given by the principal to show that the contract was made on his behalf, so as to entitle him to sue thereon (*Morris v. Wilson*, 1859, 5 Jur. N. S. 163; *Bateman v. Phillips*, 1812, 15 East, 272); provided, that when the contract is in writing, such evidence cannot be given if it is inconsistent with the express terms thereof (*Humble v. Hunter*, 1848, 12 Q. B. 310; 76 R. R. 291, where an agent who executed a charter-party in his own name was described therein as the owner of the vessel, and it was held that the principal was not entitled to give evidence of the agency, because such evidence was inconsistent with the description of the agent as the owner). The right of the principal to sue in his own name is not affected by a rule or custom of the market in which the contract is made, according to which the agent alone is in such market regarded as the contracting party (e.g. in the case of contracts made by brokers on the Stock Exchange), whether the principal was aware of the existence of such a rule or custom at the time when he authorised the agent to make the contract or not (*Langton v. Waite*, 1868, L. R. 6 Eq. 165; *Humphrey v. Lucas*, 1845, 2 Car. & Kir. 152). But his right to sue may be excluded by the terms of the contract. Thus if a part-owner of a ship insures her in a mutual insurance association of which he is a member, and it is provided by the policy that the right to recover in respect of losses shall be confined to members of the association, the other part-owners, not being members, have no right to sue on the policy as undisclosed principals (*Montgomerie v. U. K. Mutual S. S. Association*, [1891] 1 Q. B. 370).

[As against third parties, a principal is entitled to take the benefit of contracts made by his agent, although such agent, in fraud of his principal, may have contracted with the third party in his own name and not in that of the principal (*Tiedemann v. Ledermann*, [1899] 2 Q. B. p. 66).]

Foreign Principals.—In the absence of evidence to the contrary, it is presumed that a home agent is not authorised to establish privity of contract between his foreign principal and third persons (see the cases cited in treating of the liability of the principal upon an agent's contracts). A foreign principal, therefore, is not entitled to sue upon a contract made in England on his behalf, unless it is proved that the agent was authorised to make the principal a contracting party, and it appears to have been the intention of the agent and of the other contracting party that privity of contract should be established between the principal and such other contracting party (*Die Elbinger Actien Gesellschaft v. Claye*, 1873, L. R. 8 Q. B. 313; *Malcolm v. Hoyle*, 1893, 63 L. J. Q. B. 1).

As to the right of the principal to sue upon a deed executed on his behalf, see POWER OF ATTORNEY.

Principal's Right to sue, when subservient to that of Agent.—Where an agent, with the authority of the principal, makes a contract in his own name, so that he has a right to sue thereon, and he would be entitled as against the principal to a lien upon any sum recovered in respect of the contract, the right of the principal to sue on the contract is subservient to that of the agent, so long as the claim for which the agent would be entitled to such lien subsists; and if the other contracting party pays or settles with the agent before the satis-

faction of such claim, he is discharged from liability to the principal, though the principal may have given him notice requiring payment to himself; and to the extent of the claim secured by the lien of the agent, the payment or settlement may be by way of set-off or settlement of accounts between the agent and the other contracting party (*Drinkwater v. Goodwin*, 1775, Cowp. 251; *Hudson v. Granger*, 1821, 5 Barn. & Ald. 27; 24 R. R. 268; *Warner v. McKay*, 1836, 1 Mee. & W. 591).

Defences available against Principal.—Where a principal sues upon a contract made by his agent, the other contracting party may set up, by way of defence, the fraud, misrepresentation, knowledge, or non-disclosure of the agent as effectually as he could have set up the fraud, misrepresentation, knowledge, or non-disclosure of the principal if the principal had been suing upon a contract made by himself. In *Mullens v. Miller*, 1882, 22 Ch. D. 194, specific performance of a contract was refused on the ground of the misrepresentation by the agent of certain facts affecting the value of the property sold. In *Blackburn v. Haslam*, 1888, 21 Q. B. D. 144, it was held that the assured could not recover on a policy of insurance, because the agent who had negotiated it had omitted to disclose a material fact within his knowledge. In *Biggs v. Lawrence*, 1789, 3 T. R. 454; 1 R. R. 740, it was held that a principal was not entitled to recover the price of goods sold, because the agent who sold them knew they were intended to be used for an unlawful purpose. So, where an agent lent money to an executor, knowing that he intended to misapply it, and took a mortgage of the testator's property as security for repayment, and the executor did misapply the money, it was held that the mortgage was invalid, and that the principal had no claim against the estate of the testator (*Collinson v. Lister*, 1855, 7 De G., M. & G. 634; 44 E. R. 247). The fraud, non-disclosure, or knowledge of the principal also constitutes as good a defence, in an action by him upon a contract made by his agent, as if the contract had been made by himself (*Ludgater v. Love*, 1881, 44 L. T. 694; *Mayhew v. Eames*, 1825, 3 Barn. & Cress. 601; 27 R. R. 427).

Defences when Agent allowed to Appear as Principal.—If an agent is permitted to appear as the principal in a transaction, and the person dealing with him does so in the belief that he is the principal, such person is entitled, upon the disclosure of the real principal, to be put in the same position as if the agent had been the principal, and therefore to avail himself, in an action by the principal, of every defence which would have been available against the agent at the time when the real principal was first disclosed. Thus, if an agent is permitted to sell goods as the owner thereof, and the buyer, in the belief that the agent is the owner, receives them in discharge of a debt due from him, or pays or otherwise settles with him for the price, the buyer is discharged from liability to the principal (*Ramazotti v. Bowring*, 1859, 7 C. B. N. S. 851; *Coates v. Lewes*, 1808, 1 Camp. N. P. 444; 10 R. R. 725; *Curlewis v. Birkbeck*, 1863, 3 F. & F. 894). So, where a factor or other agent, being intrusted with the possession of goods, or of the documents of title thereto, sells the goods in his own name to a person who believes him to be selling his own goods, the buyer is entitled, in an action by the principal for the price, to set off a debt due from the agent personally, provided the debt was incurred before the buyer received notice that the goods were not the property of the agent (*George v. Clagett*, 1797, 7 T. R.

359; 4 R. R. 462; *Ex parte Dixon*, 1876, 4 Ch. D. 133; *Baring v. Corrie*, 1818, 2 Barn. & Ald. 137; 20 R. R. 383; *Rabone v. Williams*, 1785, 7 T. R. 360; 4 R. R. 463; *Borries v. Imp. Ottoman Bank*, 1873, L. R. 9 C. P. 38).

The rule is founded on the doctrine of estoppel, and applies only where the person dealing with the agent is led by the conduct of the principal to believe, and does in fact believe, that the agent is acting on his own behalf, and the right of set-off accrues before he is undeceived. If a person buys goods from an agent, knowing him to be selling them as agent, though not knowing who the principal is (*Semenza v. Brinsley*, 1865, 18 C. B. N. S. 467; *Moore v. Clementson*, 1809, 2 Camp. N. P. 22; 11 R. R. 653; *Fish v. Kempton*, 1849, 7 C. B. 687; 78 R. R. 798; *Hornby v. Lacy*, 1817, 6 M. & S. 166; 18 R. R. 345), or if he has no particular belief whether the seller is acting as an agent or on his own behalf (*Cooke v. Eshelby*, 1887, 12 App. Cas. 271), he has no right to set off, as against the principal, a debt due from the agent. Nor is the defence available where the right of set-off accrues after notice that the seller was acting as an agent (*Mildred v. Maspons*, 1883, 8 App. Cas. 874; *Kaltenbach v. Lewis*, 1885, 10 App. Cas. 617; *Ex parte Dixon*, 1876, 4 Ch. D. 133).

Liability of Principal for Wrongs of Agent.—A principal is civilly liable to third persons for everything wrongfully done or omitted by his agent while acting on his behalf, provided that the agent was acting either in pursuance of his authority or in the ordinary course of his employment. On the other hand, a principal is not liable for a wrong committed by his agent, if the agent was not acting on his behalf at the time, or if he was acting, without the principal's authority, outside the ordinary course of his employment. These principles extend to cases where the wrongful act is wilful or fraudulent; and when the wrong is committed by the agent in the ordinary course of his employment, the fact that the principal expressly instructed the agent not to do the act complained of is no defence (*Limpus v. L. G. O. Co.*, 1862, 1 H. & C. 526). Nor does the fact that the wrongful act is a felony constitute any defence (*Osborn v. Gillett*, 1873, L. R. 8 Ex. 88). Thus, if an agent, in the ordinary course of his employment on the principal's behalf, commits a trespass (*Hatch v. Hale*, 1850, 15 Q. B. 10; *Bates v. Pilling*, 1826, 6 Barn. & Cress. 38; *Hurry v. Rickman*, 1831, 1 Moo. & R. 126), or infringes a patent or trade-mark (*Betts v. De Vitre*, 1868, L. R. 3 Ch. 429; *Tonge v. Ward*, 1869, 21 L. T. 480), or wrongfully converts the goods or chattels of a third person, by refusing to deliver them up to him, on demand (*Giles v. Taff Vale Rly. Co.*, 1853, 2 El. & Bl. 822; *Farborough v. Bank of England*, 1812, 16 East, 6; 14 R. R. 272), or by selling or otherwise disposing of them without his authority (*Tronson v. Dent*, 1853, 8 Moo. P. C. 419; *Eubank v. Nutting*, 1849, 7 C. B. 797; 78 R. R. 830; *Cannan v. Meaburn*, 1823, 1 Bing. 243), the principal is civilly liable for the trespass, infringement, or conversion, even if he did not authorise it [(see *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392; and cp. *Carter v. St. Mary Abbot's, Kensington (Vestry of)*, 1900, 64 J. P. 548; *Hamlyn v. Houston & Co.*, [1903] 1 K. B. 81)], to the same extent as he would have been if he had committed the wrong himself. So, if a factor or other agent fraudulently misrepresents the quality of goods sold by him on his principal's behalf, the principal is liable in an action of deceit, though he did not authorise the agent to make the misrepresentation (*Udell v. Atherton*, 1861, 7 H. & N. 172; *Hern v. Nichols*, 1708,

1 Salk. 289). So, where a wife, who managed a business on behalf of her husband, fraudulently misrepresented the quantity of business done, to a person who bought the business on the faith of the misrepresentations, it was held that the husband was liable for the fraud (*Taylor v. Green*, 1837, 8 Car. & P. 316). On the same principle, a corporation or joint-stock company is liable, in an action of deceit, for the fraudulent misrepresentations of its directors or other agents, made in the course of their employment on its behalf, and for its benefit, though they were not authorised to make the misrepresentations (*Barwick v. Joint-Stock Bank*, 1867, L. R. 2 Ex. 259; *National Exchange Co. v. Drew*, 1855, 2 Macq. H. L. Cas. 103; *Mackay v. Commercial Bank*, 1874, L. R. 5 P. C. 394; *Blake v. Albion Life Ass. Society*, 1878, 4 C. P. D. 94; *Swire v. Francis*, 1877, 3 App. Cas. 106). On the other hand, if an agent, without the authority of the principal, commits a fraud for his own private ends, and not for the principal's benefit or supposed benefit, the principal is not liable for the fraud, because the agent in committing it was not acting on his behalf (*British Mutual Bank v. Charnwood Forest Rly. Co.*, 1887, 18 Q. B. D. 714; *Thorne v. Heard*, [1895] A. C. 495; *Coleman v. Riches*, 1855, 2 Com. L. R. 795; *Weir v. Bell*, 1878, 3 Ex. D. 238; *Bishop v. Jersey*, 1854, 2 Drew. 143). Where, however, in consequence of the fraud of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, he is liable to restore such money or property, or to make compensation to the extent of the benefit received by him (*Reid v. Rigby*, [1894] 2 Q. B. 40; *Thompson v. Bell*, 1854, 10 Ex. Rep. 10; *Ex parte Shoolbred*, 1880, 28 W. R. 339; *Marsh v. Keating*, 1834, 1 Bing. N. C. 198; *Glyn v. Baker*, 1811, 13 East, 509; 12 R. R. 414).

If, at the time of the wrongful act or omission, the agent was not acting within the scope of his actual authority, nor in the ordinary course of his employment, the principal is not liable for the wrong. Thus, where a bailiff, who was sent to levy a distress, committed an unnecessary and unauthorised assault (*Richards v. West Middlesex Waterworks Co.*, 1885, 15 Q. B. D. 660), and where the manager of a sewage farm committed an unauthorised trespass upon land adjoining the farm (*Bolingbroke v. Swindon Local Board*, 1874, L. R. 9 C. P. 575), it was held that the principal was not liable. So, if a solicitor, when issuing a writ of *fi. fa.*, verbally directs the sheriff to seize particular goods which are not the property of the debtor, without the client's authority, the client is not liable for the trespass, because it is not in the ordinary course of a solicitor's employment to interfere with the sheriff in the performance of his duties (*Smith v. Keal*, 1882, 9 Q. B. D. 340; *Hewitt v. Spiers*, 1896, 13 T. L. R. 64). Otherwise, where the sheriff is misled by the solicitor's indorsement on the writ, it being part of the solicitor's duty, in the ordinary course of his employment, to indorse the writ (*Morris v. Salberg*, 1889, 22 Q. B. D. 614; *Lee v. Rumilly*, 1891, 55 J. P. 519). So, a company is not liable for the unauthorised misrepresentations of its secretary, it not being in the ordinary course of a secretary's employment to make any representations whatever on behalf of the company (*Barnett v. South London Tram Co.*, 1887, 18 Q. B. D. 815; *Newlands v. Employers' Accident Association*, 1885, 54 L. J. Q. B. 428).

The liability of a principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them, but if he chooses to sue the agent alone, and recovers judgment against him, such judgment, though unsatisfied, is a bar to

any proceedings against the principal (*Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547; *Wright v. L. G. O. Co.*, 1877, 2 Q. B. D. 271).

[The responsibility of the principal is not avoided by the fact that the actual tort-feasor is an independent contractor (*The Snark*, [1900] P. 105; and *cp. Penny v. Wimbledon U. C.*, [1898] 2 Q. B. 217; [1899] 2 Q. B. 72; *Hill v. Tottenham U. D. C.*, [1899] 79 L. T. 495); and under the Copyright Acts agent and principal are alike responsible for infringement (*Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73).]

Misrepresentations as to Credit.—In consequence of the provisions of Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 6, a principal cannot be sued in respect of misrepresentations made by his agent as to the character or credit of a person, to the intent that such person may obtain money or goods upon credit, unless the representation is in writing, signed by the principal himself. The signature of the agent is insufficient, even if it be expressly authorised or ratified by the principal (*Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301).

Liability for Innocent Misrepresentations of Agent.—Where an agent, without the principal's authority, makes a false statement, believing it to be true, with regard to facts of which the principal has knowledge, a difficulty arises. The agent has not committed any fraud, nor has the principal authorised any. It is clear, however, that if the principal intentionally concealed the truth from the agent, in order that he might make a false statement, the principal is liable as for a fraudulent misrepresentation (*Ludgater v. Love*, 1881, 44 L. T. 694). Whether the principal is liable in an action of deceit, in the absence of such an intentional concealment, is a question upon which there is a conflict of authority (see *Cornfoot v. Fowke*, 1840, 6 Mee. & W. 358; *Brett v. Clowser*, 1880, 5 C. P. D. 376; *Fuller v. Wilson*, 1842, 3 Q. B. 58, 68, 1009). After the judgments of the Lords in *Derry v. Peek*, 1889, 14 App. Cas. 337, it seems probable that he would not be held liable—at all events in that form of action.

RELATIONS BETWEEN AGENTS AND THIRD PERSONS.

Liability of Agent on Contracts.—An agent is not personally liable upon any contract made by him merely in his representative capacity, such a contract being deemed to be the contract of the principal alone (*Johnson v. Ogilby*, 1734, 3 P. Wms. 277; 24 E. R. 1064; *Owen v. Gooch*, 1797, 2 Esp. 567; *Ex parte Hartop*, 1806, 12 Ves. Jun. 352; 33 E. R. 132). Even where the agent has no authority to make the contract on behalf of the principal, he is not personally liable on the contract, if he professes to make it merely in his capacity of agent (*Lewis v. Nicholson*, 1852, 18 Q. B. 503; *Jenkins v. Hutchinson*, 1849, 13 Q. B. 744; 78 R. R. 500), though he may be liable upon an implied warranty that he is duly authorised (see *post*). This principle extends to cases where the agent is guilty of fraud, and makes the contract, knowing that he has not authority to do so (S. C.). An agent may, however, though contracting on behalf of his principal, intend to pledge his own credit, or he may execute the contract in such a manner, or contract in such terms, or otherwise act in such a way as to estop himself from denying that such was his intention. In such cases he is personally liable on the contract, whether the principal be disclosed or undisclosed, and the other contracting party may, as a general rule, elect to charge either him or the principal thereon (*Dramburg v. Pollitzer*, 1873, 28 L. T. 470; *Saxon v.*

Blake, 1861, 29 Beav. 438). Thus, if an agent buys goods at a sale by auction, and gives his own name as buyer, he is personally liable, unless he can clearly prove that he did not intend to contract personally, and that the auctioneer was aware of that (*Williamson v. Barton*, 1862, 7 H. & N. 899). So, if an agent takes delivery of goods, as assignee of a bill of lading which provides that the goods shall be delivered to the "consignee or his assigns, he or they paying freight," he is personally liable on an implied contract to pay the freight, though the bill of lading was assigned to him merely as an agent for sale (*Bell v. Kymer*, 1814, 5 Taun. 477; *Dougal v. Kemble*, 1826, 3 Bing. 383; 28 R. R. 648; cp. *Amos v. Temperley*, 1841, 8 Mee. & W. 798; 58 R. R. 876; *Steel v. Houlder*, 1887, 3 T. L. R. 300; *Wilson v. Kymer*, 1813, 1 M. & S. 157). So, where an auctioneer sold goods in his possession, under conditions of sale which provided that the lots should be cleared within three days, and that if from any cause the auctioneer was unable to deliver, etc., the purchaser should accept compensation, it was held that the auctioneer must be taken to have personally contracted to duly deliver the goods, though the name of the principal was disclosed at the sale (*Woolfe v. Horne*, 1887, 2 Q. B. D. 355). An auctioneer is generally deemed to contract personally when the name of the principal is not disclosed at the sale (*Franklyn v. Lamond*, 1847, 4 C. B. 637; 72 R. R. 671; *Wood v. Baxter*, 1883, 49 L. T. 45).

The question whether an agent who has entered into a contract is to be deemed to have contracted personally, or merely in his representative capacity, depends, in the case of a contract under seal, upon the manner in which the deed is executed; in the case of a bill of exchange, promissory note, or cheque, upon whether his name appears thereon as the contracting party; and in the case of any other contract, upon what appears to have been the intention of the parties. Such intention, if the contract is in writing, is a question of law, and must, as a general rule, be ascertained exclusively from the terms of the written agreement (*Spittle v. Lavender*, 1821, 5 Moo. K. B. 270; *Bowes v. Shand*, 1877, 2 App. Cas. 455). In the case of a contract not reduced to writing, it is a question of fact (*Jones v. Littleddale*, 1837, 6 Ad. & E. 486; 45 R. R. 542; *Holding v. Elliott*, 1860, 5 H. & N. 117; *Lakeman v. Mountstephen*, 1874, L. R. 7 H. L. 17; *Seaber v. Hawkes*, 1831, 5 Moo. & P. 549; *Ex parte Hartop*, 1806, 12 Ves. Jun. 352; 33 E. R. 132). In *Long v. Millar*, 1879, 4 C. P. D. 450, an estate agent, who contracted to sell land, gave a receipt for the deposit in his own name, and it was held that it was a question for the jury whether he had contracted personally. Where an agent has made a contract in England on behalf of a principal who resides abroad, it is presumed that he intended to pledge his own credit, unless a contrary intention appears from the terms of the contract, or from the other circumstances of the case (*Hutton v. Bulloch*, 1874, L. R. 9 Q. B. 572; *Die Elbinger Actien Gesellschaft v. Claye*, 1873, L. R. 8 Q. B. 313; *Dramburg v. Pollitzer*, 1873, 28 L. T. 470; *Peterson v. Ayre*, 1853, 13 C. B. 353). This, however, is merely a presumption of fact, and does not affect the general rule that, in the case of a written contract, the intention is to be ascertained from the terms thereof (*Gadd v. Houghton*, 1876, 1 Ex. D. 357; *Glover v. Langford*, 1892, 8 T. L. R. 628; *Green v. Hopke*, 1856, 18 C. B. 549; *Mahony v. Kekulé*, 1854, 14 C. B. 390; *Reynolds v. Peapes*, 1890, 6 T. L. R. 49).

Contracts under Seal.—The question whether an agent is personally liable upon a deed executed on behalf of his principal, depends upon

whether the deed is executed in the name of the principal, or in the name of the agent. If the principal is named as the party to the deed, and it is executed in his name, or is expressed to be executed on his behalf, the agent is not liable. But an agent who covenants under his own hand and seal is personally liable on the covenant, even if he is described in the deed as covenanting for and on behalf of a principal therein named (*Appleton v. Binks*, 1804, 5 East, 148; 7 R. R. 672; *Cass v. Rudele*, 1692, 2 Vern. 280; 23 E. R. 781).

Bills of Exchange, Promissory Notes, and Cheques.—Signature is essential to liability upon a bill of exchange, promissory note, or cheque (Bills of Exchange Act, 1882, s. 23). An agent, therefore, is not liable on such an instrument, unless his name appears therein as the contracting party. Where the name of an agent appears as the drawee of a bill of exchange, and he signs it, he is personally liable as acceptor, even if he adds words to the signature indicating that he signs for and on behalf of his principal or as an agent, because the only person who can be liable as acceptor is the person on whom the bill is drawn; and in determining whether a signature is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is adopted (*ibid.*, s. 26 (2); *Mare v. Charles*, 1856, 5 El. & Bl. 978; *Jones v. Jackson*, 1870, 22 L. T. 728; *Herald v. Connah*, 1876, 34 L. T. 885; *Nicholls v. Diamond*, 1853, 9 Ex. Rep. 154). On the other hand, where the name of the principal appears as that of the drawee, and the agent accepts the bill, he is not liable as acceptor, even if he signs his own name without any qualification (*Polhill v. Walter*, 1832, 3 Barn. & Adol. 114; 37 R. R. 344; *Okell v. Charles*, 1876, 34 L. T. 822). With regard to liability as drawer or indorser of a bill of exchange or cheque, or as maker or indorser of a promissory note, the agent is not liable where he merely signs the principal's name, or where he qualifies his signature by adding words thereto, indicating that he signs for and on behalf of a principal or as an agent (Bills of Exchange Act, 1882, s. 26 (1); *Wilson v. Barthrop*, 1837, 2 Mee. & W. 863; *Alexander v. Sizer*, 1869, L. R. 4 Ex. 102; *Aggs v. Nicholson*, 1856, 1 H. & N. 165; *Lindus v. Melrose*, 1858, 3 H. & N. 177); but he is personally liable if he signs his own name without any such qualification; and the mere addition of words describing him as an agent is not sufficient to exempt him from personal liability on the instrument, whether the principal is named therein or not (*Nicholls v. Diamond*, 1853, 9 Ex. Rep. 154; *Leadbitter v. Farrow*, 1816, 5 M. & S. 345; 17 R. R. 345; *Sowerby v. Butcher*, 1834, 2 C. & M. 368; *Allan v. Miller*, 1870, 22 L. T. 825; *Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361; *Penkivil v. Connell*, 1850, 5 Ex. Rep. 381; *Healey v. Storey*, 1848, 3 Ex. Rep. 3; *Fox v. Frith*, 1842, 10 Mee. & W. 131; 62 R. R. 546; *Bottomley v. Fisher*, 1862, 1 H. & C. 211).

Written Contracts generally.—In the case of a contract in writing other than a bill of exchange, promissory note, or cheque, the question whether the agent is personally liable depends upon the intention of the parties, as shown by the terms of the written agreement as a whole (*Norton v. Herron*, 1825, 1 Car. & P. 648; 28 R. R. 797; *Tanner v. Christian*, 1855, 4 El. & Bl. 591). If the contract is signed by the agent in his own name, without qualification, he is presumed to have intended to contract personally, unless the terms of the contract are clearly inconsistent with such an intention (*Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361; *Hough v. Manzanos*, 1879, 4 Ex. D. 104; *Cooke v. Wilson*, 1856, 1 C. B. N. S. 153; *Parker v. Winlow*, 1857, 7 El. & Bl. 942; *Kennedy v. Gourveia*,

1823, 3 Dow. & Ry. K. B. 503; 26 R. R. 616). In *Paice v. Walker*, 1870, L. R. 5 Ex. 173, an agent, who signed a contract in his own name, was held personally liable, though in the body of the contract he was expressed to be acting "as agent for" a principal therein named. Where, however, the agent is described in the contract as acting "on account of" or "on behalf of" a named principal, that is, as a general rule, sufficient to exclude personal liability, though the principal be a foreigner, and though the contract be signed by the agent in his own name (*Gadd v. Houghton*, 1876, 1 Ex. D. 357; *Ogden v. Hall*, 1879, 40 L. T. 751; *Spittle v. Lavender*, 1821, 2 B. & B. 452; *Downman v. Williams*, 1845, 7 Q. B. 103; 68 R. R. 413). In *Gadd v. Houghton*, two of the Lords Justices disapproved the decision in *Paice v. Walker*, on the ground that the words "as agent for" were sufficient to show that there was no intention to contract personally.

Where the agent adds words to his signature, indicating that he signs as an agent, or for or on behalf of a principal, he is not personally liable, unless the terms of the contract clearly show that, notwithstanding the form of the signature, he intended to contract personally (*Green v. Hopke*, 1856, 18 C. B. 549; *Mahony v. Kekulé*, 1854, 14 C. B. 390; *Deslandes v. Gregory*, 1860, 30 L. J. Q. B. 36; *Redpath v. Wigg*, 1866, L. R. 1 Ex. 335). In *Lennard v. Robinson*, 1855, 5 El. & Bl. 125, and *Young v. Schuler*, 1883, 11 Q. B. D. 651, the agent was held personally liable, although he signed the contract in such a manner as *prima facie* to exclude personal liability, because the terms of the contract were such as to show, notwithstanding the qualified signature, that he intended to contract personally. The mere fact that the agent is described as an agent for a named principal, whether as part of the signature or in the body of the contract, is not deemed to be a qualification of the signature, or to indicate an intention not to contract personally (*Parker v. Winlow*, 1857, 7 El. & Bl. 942; *McCollin v. Gilpin*, 1881, 6 Q. B. D. 516; *Hutcheson v. Eaton*, 1884, 13 Q. B. 861).

When Parol Evidence of Intention Admissible.—Where an agent enters into a written contract in such terms as to indicate an intention to contract personally, he cannot give parol evidence for the purpose of showing that it was the intention of the parties that he should not be personally liable on the contract, because such evidence would be inconsistent with the terms of the written agreement (*Higgins v. Senior*, 1841, 8 Mee. & W. 834; 58 R. R. 884; *Holding v. Elliott*, 1860, 5 H. & N. 117; *Jones v. Littledale*, 1837, 6 Ad. & E. 486; 45 R. R. 542). In such a case, however, a plea by the agent, that before he signed the contract it was verbally agreed between him and the other contracting party that he should not be personally liable thereon, and that he *bona fide* believed at the time when he signed it that he would not be personally liable, is a good equitable plea, and may be proved by parol evidence, because it would be inequitable to take advantage of the mistake in drawing the contract in such a manner as to make him personally liable (*Wake v. Harrop*, 1862, 1 H. & C. 202). Where an agent signs a contract expressly "as agent," or otherwise contracts in writing in such terms as *prima facie* to exclude personal liability, parol evidence is nevertheless admissible to show that, by a custom or usage of trade, an agent so contracting is, under the circumstances, personally liable; provided that such custom or usage is not inconsistent with the express terms of the contract. In *Hutchinson v. Tatham*, 1873, L. R. 8 C. P. 482, an agent signed a charter-party expressly "as agent for principals," who were undisclosed, and it was

held that evidence of a general custom, whereby an agent so signing was personally liable in the event of his not disclosing the principal within a reasonable time after the contract was made, was admissible. So evidence of a custom or usage of a particular trade, whereby a broker entering into a contract as such, is understood to contract personally, unless he discloses the principal at the time of the contract (*Pike v. Ongley*, 1887, 18 Q. B. D. 708; *Dale v. Humfrey*, 1858, El. B. & E. 1004), or unless the name of the principal is inserted in the contract (*Fleet v. Murton*, 1871, L. R. 7 Q. B. 126; *Bacmeister v. Fenton*, 1883, 1 C. & E. 121), is admissible. But where a broker entered into a contract containing a provision that he should act as arbitrator in the event of a dispute between the parties, it was held that evidence of a custom by which he would be personally liable was not admissible, because such a custom was inconsistent with the arbitration clause (*Barrow v. Dyster*, 1884, 13 Q. B. D. 635). It may be proved by parol evidence that a person who has contracted professedly as an agent is himself the real principal, and was contracting on his own behalf, so as to render him liable on the contract (*Carr v. Jackson*, 1852, 7 Ex. Rep. 382; *Jenkins v. Hutchinson*, 1849, 13 Ad. & E. N. S. 744; *Railton v. Hodgson*, 1812, 15 East, 67; 13 R. R. 373).

Liability where Principal Fictitious or Non-existent.—Where a person contracts, professedly on behalf of another person, who is fictitious or non-existent, the professed agent is presumed to intend to contract personally, unless a contrary intention appears, and in the case of a contract in writing, parol evidence of such contrary intention is not admissible (*Scott v. Ebury*, 1867, L. R. 2 C. P. 255; *Coutts v. Irish Exhibition*, 1891, 7 T. L. R. 313). In *Kelner v. Baxter*, 1866, L. R. 2 C. P. 174, the defendants had entered into a written contract in which they were described as contracting on behalf of a company then in the course of formation, and it was held that they were personally liable, because otherwise no effect could be given to the contract, and that parol evidence was not admissible to show that they did not intend to contract personally. This case is sometimes cited as an authority for the proposition that a person contracting professedly as agent for a nonentity is personally liable on the contract, but such a proposition is too wide. A person so contracting will not be held personally liable contrary to the proved intention of the parties, or where a contrary intention plainly appears from the terms of the contract (*Jones v. Hope*, 1880, 3 T. L. R. 247 n.; *Hollman v. Pullin*, 1884, 1 C. & E. 254; *Overton v. Hewett*, 1887, 3 T. L. R. 246).

Implied Warranty of Authority.—Where a person, by professing to contract on behalf of another, or otherwise by words or conduct, represents that he has authority to contract or act on behalf of another, and the person to whom the representation is made acts upon it, the person making the representation is deemed to impliedly warrant that he has the authority which he professes to exercise or have, in the absence of agreement, express or implied, to the contrary. This principle applies whether the professed agent acts in good faith, believing that he has authority, or acts fraudulently, knowing that he has not authority (*Collen v. Wright*, 1857, 8 El. & Bl. 647; *Suart v. Haigh*, 1893, 9 T. L. R. 488; *Hughes v. Graeme*, 1864, 33 L. J. Q. B. 335; *Oxenham v. Smythe*, 1861, 6 H. & N. 690); [but not if at the time of purporting to contract, the agent expressly disclaimed any present authority (*Halbot v. Lens*, [1901] 1 Ch. 344)]. Thus, where the directors of a company, who had

no authority to overdraw the company's banking account, wrote a letter to the bank, representing that the manager of the company was authorised to draw cheques on the account, which, to their knowledge, was then overdrawn, it was held that they were liable to the bank on an implied warranty that they had the company's authority to overdraw the account (*Cherry v. Colonial Bank*, 1869, 38 L. J. P. C. 49; cp. *Beattie v. Ebury*, 1874, L. R. 7 H. L. 102). So, if the directors of a company which has fully exercised its borrowing powers borrow money professedly on behalf of the company, or hold out an officer or agent of the company as having authority to borrow on its behalf, they are deemed to warrant to any person lending money on the faith of such representation or holding out, that they are duly authorised to borrow on behalf of the company, and are liable for breach of such implied warranty, though they acted in good faith, not knowing that the borrowing powers had been exhausted (*Firbank v. Humphreys*, 1886, 18 Q. B. D. 54; *Weeks v. Propert*, 1873, L. R. 8 C. P. 427; *Chapleo v. Brunswick Building Society*, 1881, 6 Q. B. D. 696; see also *Richardson v. Williamson*, 1871, L. R. 6 Q. B. 276). [The principle of *Collen v. Wright*, *ubi supra*, is not confined to cases where the transaction with the person representing himself to be an agent results in a contract. Where a broker applied to the Bank of England for a power of attorney for the sale of consols, believing himself to be instructed by the stockholder, and *bonâ fide* induced the bank to make the transfer to a purchaser upon a power of attorney to which the stockholder's signature was forged, it was held that the broker must be taken to have given an implied warranty of authority and was therefore liable to indemnify the bank against the stockholder's claim for restitution (*Starkey v. Bank of England*, [1903] A. C. 114; see also *Bank of England v. Cutler*, [1907] 1 K. B. 889; [1908] W. N. 98).] When the agent acts fraudulently, he may be sued *ex delicto* for the deceit, or *ex contractu* for breach of the implied warranty, at the option of the person deceived (*Randell v. Trimen*, 1856, 18 C. B. 786; *Polhill v. Walter*, 1832, 3 Barn. & Adol. 114; 37 R. R. 344). A warranty of authority will not, however, be implied contrary to the proved intention of the parties. In *Lilly v. Smales*, [1892] 1 Q. B. 456, a shipbroker entered into a charter-party and signed it "by telegraphic authority; as agent," and upon evidence being given that such a form of signature was commonly adopted in order to negative the implication of any further warranty than that a telegram which purported to authorise the agent to make the contract in question had been received, it was held that the shipbroker was not liable for the mistake in the telegram (cp. *Suart v. Haigh*, 1893, 9 T. L. R. 488). And the doctrine of implied warranty of authority only applies where the assumption of authority implies a misrepresentation of fact, and not where the facts are fully known to both parties, and there is merely an innocent misrepresentation, or a common misconception, as to the existence or extent of the authority in point of law (*Rashdall v. Ford*, 1866, L. R. 2 Eq. 750; *Eaglesfield v. Londonderry*, 1876, 38 L. T. 303; *Jones v. Hope*, 1880, 3 T. L. R. 247).

The measure of damages recoverable for breach of a warranty of authority is the loss actually sustained in consequence of the breach of warranty, provided such loss is a natural and probable consequence thereof, or is such as the parties might, under the particular circumstances, have reasonably expected to result as a consequence thereof (*Pow v. Davis*, 1861, 1 B. & S. 220; *Godwin v. Francis*, 1870,

L. R. 5 C. P. 295; *Spedding v. Nevell*, 1869, L. R. 4 C. P. 212). In other words, the plaintiff is entitled to recover, not only the loss sustained in consequence of the misrepresentation, but also the estimated profit that he would have made upon the transaction if the agent had been duly authorised. In *Simons v. Patchett*, 1857, 7 El. & Bl. 568, where a person contracted to buy a ship on behalf of another, without his authority, it was held that the measure of damages was the difference between the contract price and the price at which the ship was resold by the seller, upon the contract being repudiated by the person on whose behalf it was made. In *Ex parte Panmure*, 1883, 24 Ch. D. 367, a broker, being instructed to apply for shares in a certain company, by mistake made the application to another company, and shares in such other company were allotted to the principal. The company being subsequently wound up, and the principal's name removed from the list of contributories on the ground that he had not authorised the application for shares, it was held that the broker was liable to pay to the liquidator the full amount payable on the shares (see also *Meek v. Wendt*, 1888, 21 Q. B. D. 126; *Firbank v. Humphreys, Richardson v. Williamson*, and the other cases cited *supra*). Where, however, the repudiated contract would not have been enforceable at law, as against the person on whose behalf it was entered into, because the formalities required by law were not complied with, the doctrine of part performance does not apply, so as to render the professed agent liable for damages, either at law or in equity, for the breach of warranty of authority even if the contract would, in pursuance of such doctrine, have been enforceable in equity against the professed principal had it been made with his authority (*Warr v. Jones*, 1876, 24 W. R. 695; *Sainsbury v. Jones*, 1840, 2 Beav. 462; 48 E. R. 1260; 50 R. R. 245).

Right of Agent to Sue on Contracts.—An agent has no right of action upon any contract made by him merely in his representative capacity, except where he is entitled to a lien upon, or has a special property in, the subject-matter of the contract, or has some beneficial interest in the completion thereof. This principle applies whether the principal is disclosed or undisclosed (*Sargent v. Morris*, 1820, 3 Barn. & Ald. 277; 22 R. R. 382; *Gray v. Pearson*, 1870, L. R. 5 C. P. 568; *Evans v. Hooper*, 1875, 1 Q. B. D. 45; *Bowen v. Morris*, 1810, 2 Taun. 374), and though the agent is acting under a *del credere* commission (*Bramwell v. Spiller*, 1870, 21 L. T. 672). Thus, where a broker contracted as follows:—"I have this day sold you, on account of X., etc." (signed) "A. B., broker," it was held that he could not sue the buyer for refusing to accept the goods (*Fairlie v. Fenton*, 1870, L. R. 5 Ex. 169). Nor, if the buyer accepted the goods in such a case, would the broker be entitled to sue him for the price (*Fawkes v. Lamb*, 1862, 31 L. J. Q. B. 98). On the other hand, a factor or auctioneer is entitled to sue in his own name for the price of goods sold by him as such, because he has a special property in, and may have a lien upon, the goods (*Snee v. Prescott*, 1743, 1 Atk. 248; *Williams v. Millington*, 1788, 1 Black. (H.) 81; 2 R. R. 724; *Dickenson v. Naul*, 1833, 4 Barn. & Adol. 638; *Fisher v. Marsh*, 1865, 6 B. & S. 411). And if an agent contracts personally, he may sue in his own name on the contract (*Cooke v. Wilson*, 1856, 1 C. B. N. S. 153). In *Short v. Spackman*, 1831, 2 Barn. & Adol. 962, it was held that a broker, having bought goods in his own name, was entitled to recover damages against the seller for non-delivery thereof, though the seller was told at the time of the contract that the broker was acting

on behalf of an unnamed principal, and the principal, with the acquiescence of the broker, renounced the contract, and it was arranged between them that he (the principal) should have no interest therein.

Except where the agent would be entitled to a lien, as against the principal, upon the sum recovered in respect of the contract, the right of an agent to sue in his own name upon a contract made on his principal's behalf is subservient to the right of the principal to sue, and ceases on the intervention of the principal; and the other contracting party, in an action by the agent on the contract, is entitled to avail himself of every defence, including that of set-off, which would have been available against the principal, if he had been suing on the contract (*Sadler v. Leigh*, 1815, 4 Camp. N. P. 195; *Rogers v. Hadley*, 1861, 2 H. & C. 227; *Atkinson v. Cotesworth*, 1825, 3 Barn. & Cress. 647). Where the agent would have a lien on the sum recovered, he has a right to sue, and compel payment to himself, in priority to the principal (*Drinkwater v. Goodwin*, 1775, Cowp. 251); and in such a case, the agent's right of lien will not be permitted to be prejudiced by a settlement between the principal and the other contracting party, or by a set-off against the principal, unless the conduct of the agent led the other contracting party to believe that he would be discharged by the settlement with the principal, or that he would be entitled to the right of set-off. In *Atkyns v. Amber*, 1796, 2 Esp. 493, where an agent sold, in his own name, goods upon which he had made advances, it was held that the buyer had no right, in an action by the agent for the price, to set off a debt due from the principal. So, where an auctioneer sued for the price of goods sold and delivered, a plea that he had sold the goods as auctioneer, and that the defendant had paid the principal for them before action, was held to be no answer, because the auctioneer would have had a lien on the proceeds for his charges (*Robinson v. Rutter*, 1855, 4 El. & Bl. 954). Otherwise, if the terms or conditions of the contract, or circumstances of the case, are such as to lead the other contracting party to believe that the agent acquiesces in his settling with, or setting off the debt due from, the principal (*Coppin v. Walker*, 1816, 7 Taun. 237; 17 R. R. 505; *Coppin v. Craig*, 1816, 7 Taun. 243; 17 R. R. 508), or if the agent is not prejudiced by such settlement or set-off (*Grice v. Kenrick*, 1870, L. R. 5 Q. B. 340).

Where an agent sues in his own name upon a contract made on behalf of his principal, the admissions of the principal, as well as the agent's own admissions, may be used in evidence against him (*Smith v. Lyon*, 1813, 3 Camp. N. P. 465; 14 R. R. 810; *Bauerman v. Radenius*, 1798, 7 T. R. 663; *Welstead v. Levy*, 1831, 1 Moo. & R. 138); and the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed until such discovery is made, even if the principal be resident abroad (*Willis v. Baddeley*, [1892] 2 Q. B. 324).

As to the right of a person to sue upon a contract which he makes professedly as agent, but really on his own behalf as principal, see *Rayner v. Grote*, 1846, 15 Mee. & W. 359; 71 R. R. 709; *Schmaltz v. Avery*, 1851, 16 Q. B. 655; *Sharman v. Brandt*, 1871, L. R. 6 Q. B. 720; *Bickerton v. Burrell*, 1816, 5 M. & S. 383.

Liability of Agent for Wrongs.—Everyone is personally liable for his own wrongful acts and omissions. The fact that an agent is acting on behalf and by the authority of his principal is, therefore, no defence to

an action by a third person for any wrongful act or omission by the agent (*Bennett v. Bayes*, 1860, 5 H. & N. 391; *Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301; *Cullen v. Thomson*, 1862, 4 Macq. H. L. Cas. 424; *Johnson v. Emerson*, 1871, L. R. 6 Ex. 329; *Perkins v. Smith*, 1752, 1 Wils. 328; *Cranch v. White*, 1835, 1 Bing. N. C. 414; 41 R. R. 616). Where the wrong is committed in the ordinary course of the agent's employment, or with the principal's authority, the principal is also liable, jointly and severally with the agent; and in such a case, if a judgment is obtained against the principal alone, the agent is discharged from liability, even though the judgment remains unsatisfied (*Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547).

DETERMINATION OF AGENCY.

The authority of an agent is determined by the expiration of the period (if any) for which it was given (*Dickinson v. Lilwall*, 1815, 4 Camp. N. P. 279); by the loss or destruction of the subject-matter of the agency (*Rhodes v. Forwood*, 1876, 1 App. Cas. 256); by the happening of any event rendering the continuance of the agency unlawful; or by the performance of the contract of agency, whereby the agent becomes *functus officio* (*Macbeth v. Ellis*, 1828, 4 Bing. 578; *Butler v. Knight*, 1867, L. R. 2 Ex. 109). If a broker or auctioneer is authorised to sell goods or other property, *prima facie* his authority ceases, and he becomes *functus officio*, immediately the contract of sale is entered into (*Blackburn v. Scholes*, 1810, 2 Camp. N. P. 343; 11 R. R. 723; *Xenos v. Wickham*, 1866, L. R. 2 H. L. 296; *Seton v. Slade*, 1802, 7 Ves. Jun. 265, 276; 32 E. R. 108; 6 R. R. 124). So where a house-agent was employed to let or sell a house, it was held that he had no authority to negotiate for a sale thereof, after having let it (*Gillow v. Aberdare*, 1893, 9 T. L. R. 12). The authority of an agent may also be determined by operation of law, in the case of the death, lunacy, unsoundness of mind, or bankruptcy of the principal or agent; or by either of them giving notice to the other of the withdrawal of his assent to the contract of agency.

[The employment of an agent implies *prima facie* that the principal employs him for reward, and warrants that he shall be recompensed for his services (*Wyatt Paine on Bailments*, p. 172). The law, in such cases, raising an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty (*The Moorcock*, [1889] 14 P. 68), that the principal will not wilfully put an end to the agent's employment for the express purpose of depriving him of his remuneration for services actually rendered. Where, however, by reason of circumstances arising without wilful act or default, and not within the contemplation of either party when the agreement for remuneration was made, the principal derives a diminished advantage from the services of the agent, the agent, in many cases, is entitled only to remuneration in respect of the actual benefit derived by his principal through his exertions (*White v. Turnbull*, 1898, 78 L. T. 726; *Beale v. Bond*, 1901, 84 L. T. 313). When there is no fixed term of employment specified between the parties, the principal may terminate the contract by giving the agent reasonable notice, after which he ceases to be entitled to remuneration (*Barrett v. Gilmour*, 1901, 6 Com. Cas. 72).]

Authority, when Irrevocable.—When the authority of an agent is

coupled with an interest, it is not determined by the death (*Kiddill v. Farnell*, 1857, 3 Sm. & G. 428; 65 E. R. 723; *Lepard v. Vernon*, 1813, 2 Ves. & Bea. 51; 35 E. R. 237; 13 R. R. 13; *Spooner v. Sandilands*, 1842, 1 Y. & C. C. 390; 62 E. R. 939; 57 R. R. 397; see, however, *Watson v. King*, 1815, 4 Camp. N. P. 272), lunacy, unsoundness of mind, or bankruptcy (*In re Rose*, 1894, 1 Manson, 218; *Yates v. Hoppe*, 1850, 9 C. B. 541; *Crowfoot v. Gurney*, 1832, 9 Bing. 372; 35 R. R. 557; *Drinkwater v. Goodwin*, 1775, Cowp. 251) of the principal, and cannot be revoked by him without the consent of the agent (*Gaussen v. Morton*, 1830, 10 Barn. & Cress. 731; 34 R. R. 558; *Raleigh v. Atkinson*, 1840, 6 Mee. & W. 670; 55 R. R. 764). An authority coupled with an interest means an authority given by deed (*Kiddill v. Farnell*, *supra*; *Gaussen v. Morton*, *supra*), or for valuable consideration (*Raleigh v. Atkinson*, *supra*; *Smart v. Sandars*, 1848, 5 C. B. 895; 75 R. R. 849), for the purpose of effectuating some security (*Walsh v. Whitcomb*, 1797, 2 Esp. 565), or of protecting or securing some interest of the agent (*Alley v. Hotson*, 1815, 4 Camp. N. P. 325; *Smart v. Sandars*, 1848, 5 C. B. 895; 75 R. R. 849). Thus, a power of attorney given by a debtor to his creditor, authorising the creditor to sell certain land and discharge the debt out of the purchase-money, is irrevocable (*Gaussen v. Morton*, 1830, 10 Barn. & Cress. 731; 34 R. R. 558; *Gurnell v. Gardner*, 1863, 4 Gif. 626; 66 E. R. 857). So, where a person agrees for valuable consideration to underwrite shares in a company, and authorises someone having an interest in the raising of the capital to apply for the shares in the name and on behalf of the underwriter, such authority is irrevocable (*Carmichael's Case*, [1896] 2 Ch. 643). So, if the drawer of an accommodation bill gives the acceptor authority to pay the bill out of moneys in his hands (*Yates v. Hoppe*, 1850, 9 C. B. 541; *Chartered Bank v. Evans*, 1869, 21 L. T. 407). The authority of an agent is not, however, irrevocable merely because he has a personal interest in the exercise thereof, or because he has a special property in and lien upon the goods in respect of which the authority is given, unless the authority is given expressly for the purpose of securing such interest or lien. Thus, the authority of a factor or auctioneer to sell goods does not become irrevocable merely because he makes advances on the security thereof, and the principal fails to duly repay such advances, unless the authority was given in consideration of the advances, or the advances were made in consideration of an express or implied agreement by the principal that the authority to sell should be irrevocable (*Raleigh v. Atkinson*, 1840, 6 Mee. & W. 670; 55 R. R. 764; *Smart v. Sandars*, 1848, 5 C. B. 895; 75 R. R. 849; *De Comas v. Prost*, 1865, 3 Moo. P. C. N. S. 158; 16 E. R. 59; *Taplin v. Florence*, 1851, 10 C. B. 744). But where an agent being duly authorised to do so, sells goods in his own name, and would be entitled to a lien on the proceeds as against the principal, the authority of the agent to sue the purchaser and give a discharge for the price is irrevocable during the subsistence of the claim in respect of which he would be entitled to the lien (*Drinkwater v. Goodwin*, 1775, Cowp. 251; *Robson v. Kemp*, 1802, 4 Esp. 233; *Hudson v. Granger*, 1821, 5 Barn. & Ald. 27; 24 R. R. 268).

If an agent is authorised to pay to a third person moneys in his hands belonging to the principal, and enters into a contract whereby he becomes personally liable to pay or hold such moneys to or to the use of such third person, the authority thereupon becomes irrevocable, and is not affected by the principal's bankruptcy (*Crowfoot v. Gurney*, 1832,

9 Bing. 372; 35 R. R. 557; *Walker v. Rostron*, 1842, 9 Mee. & W. 411; 60 R. R. 770; *Hutchinson v. Heyworth*, 1838, 9 Ad. & E. 375; 48 R. R. 530). In such a case, it is immaterial that the third person is indebted to the agent, who retains the moneys in respect of the debt (*Dickinson v. Marrow*, 1845, 14 Mee. & W. 713).

As to when a power of attorney is irrevocable against purchasers for value, see POWER OF ATTORNEY.

Revocation by Death or Insanity.—The authority of an agent, except when it is irrevocable, is determined by the death (*Shipman v. Thompson*, 1738, Willes, 104; *Farrow v. Wilson*, 1869, L. R. 4 C. P. 744; *Phillips v. Jones*, 1888, 4 T. L. R. 401; *Houstoun v. Robertson*, 1816, 6 Taun. 448; 16 R. R. 655), and probably by the lunacy or unsoundness of mind (*Drew v. Nunn*, 1879, 4 Q. B. D. 661), of either the principal or the agent; and where an agent is appointed by two or more principals jointly, his authority is determined by the death of any one of the principals (*Tasker v. Shepherd*, 1861, 6 H. & N. 575). The representatives of a deceased principal are not liable to remunerate an agent in respect of services performed after the death of the principal, even if the agent has no notice of his death at the time when the services are performed (*Campanari v. Woodburn*, 1854, 15 C. B. 400; *Pool v. Pool*, 1889, 58 L. J. P. 67; *Whitehead v. Lord*, 1852, 7 Ex. Rep. 691). And it has been held that they are not bound by a contract entered into after the principal's death, though the person with whom the contract is made has no notice of such death, and though the agent was previously held out to such person by the principal as being authorised to contract on his behalf (*Blades v. Free*, 1829, 9 Barn. & Cress. 167, where the estate of a deceased husband was held not chargeable with the price of necessaries supplied to his widow after his decease). See, however, on this point, the judgment of Brett, L.J., in *Drew v. Nunn* (cited below). The effect of the principal's insanity upon the authority of an agent was considered in *Drew v. Nunn*, 1879, 4 Q. B. D. 661, where a husband, who had held out his wife as having authority to pledge his credit, became insane, and a third person, on the faith of such holding out, and without notice of the insanity, supplied goods on the wife's orders. The Court, without deciding whether the insanity of the principal operates as a revocation of an agent's authority, held that the husband was liable for the price of the goods, on the ground that where a person is held out as an agent to others, they are justified in dealing with him as such, until they receive notice that the agency is determined.

Revocation by Bankruptcy.—The bankruptcy of an agent does not necessarily determine the contract of agency. Whether it does so or not depends upon the nature of the agent's authority and duties (*McCall v. Australian Meat Co.*, 1870, 19 W. R. 188; *Phelps v. Lyle*, 1840, 10 Ad. & E. 113; 50 R. R. 353). The bankruptcy of the principal generally operates as a revocation of an agent's authority, except when the authority is irrevocable, because the effect of the bankruptcy is to vest the property and effects of the principal in the trustee in bankruptcy, and to deprive him of his power to bind his estate (*Markwick v. Hardingham*, 1880, 15 Ch. D. 339; *Ex parte Snowball*, 1872, L. R. 7 Ch. 534; *Pearson v. Graham*, 1837, 6 Ad. & E. 899; 45 R. R. 644; *McEntire v. Potter*, 1889, 22 Q. B. D. 438). The bankruptcy commences from the first act of bankruptcy committed within the three months next preceding the presentation of the petition upon which the adjudication is made (46 & 47 Vict. c. 52, s. 43), except with regard to persons

dealing with the bankrupt for valuable consideration before the date of the receiving order, and without notice of any available act of bankruptcy (s. 49). If an agent pays away moneys of the principal after receiving notice that he has committed an act of bankruptcy, and the principal is adjudicated bankrupt upon a petition presented within three months after such act of bankruptcy, the agent is personally liable to repay to the trustee the amount so paid away (*In re Lamb*, 1887, 55 L. T. 817; *Vernon v. Hankey*, 1787, 2 T. R. 113; *Hankey v. Vernon*, 1787, 3 Bro. C. C. 313; 29 E. R. 555; *In re Whitlock*, 1893, 63 L. J. Q. B. 245; *In re Pollitt*, [1893] 1 Q. B. 455). So, if an agent, under similar circumstances, sells the goods of the principal, he is liable to the trustee for the value of the goods, or for the proceeds thereof, at the option of the trustee (*King v. Leith*, 1787, 2 T. R. 141). Otherwise, if the payment is made, or the transaction takes place, before the date of the receiving order, and the agent has no notice of any act of bankruptcy (*In re Whitlock*, 1893, 63 L. J. Q. B. 245; 46 & 47 Vict. c. 52, s. 49). The payments and acts of an agent made and done before the date of the receiving order are as valid and binding on the principal's trustee in bankruptcy as they would have been upon the principal, with respect to any third person dealing with the agent for valuable consideration without notice of any available act of bankruptcy by the principal (*Ex parte Snowball*, 1872, L. R. 7 Ch. 534—conveyance of property in pursuance of a power of attorney; *Ex parte MacDonnell*, 1819, Buck, 399—contract made by agent; 46 & 47 Vict. c. 52, s. 49). As to the right of set-off in respect of mutual dealings between the principal and agent, and the revocation of an authority given in the course of such dealings, see *Elliott v. Turquand*, 1881, 7 App. Cas. 79; *Palmer v. Day*, [1895] 2 Q. B. 618; *Naoroji v. Bank of India*, 1868, L. R. 3 C. P. 444. The bankruptcy of a principal does not revoke an authority given by him to do a mere formal act in completion of a transaction already binding on him, and which he himself, notwithstanding his bankruptcy, might be compelled to do (*Dixon v. Ewart*, 1817, 3 Mer. 322; 36 E. R. 123, where an agent was authorised by power of attorney to execute an indorsement of sale on the register of a ship).

Withdrawal of Assent.—A contract of agency may at any time be determined by the agent giving notice to the principal renouncing his authority, or, except when the authority is irrevocable, by the principal giving notice to the agent revoking the authority (*Bromley v. Holland*, 1802, 7 Ves. Jun. 28; *Venning v. Bray*, 1862, 2 B. & S. 502; *Doward v. Williams*, 1890, 6 T. L. R. 316); and where the authority is conferred by two or more principals jointly, it is sufficient if the notice of revocation or renunciation be given by or to any one of the principals (*Bristow v. Taylor*, 1817, 2 Stark. N. P. 50; 19 R. R. 675). An authority given by deed may be revoked by a verbal notice of revocation (*The Margaret Mitchell*, 1858, Swa. Ad. 382; *R. v. Wait*, 1823, 11 Price Ex. 518). The authority of an agent may be revoked by the principal, though it has been partially executed. Thus, the authority of an auctioneer to sell goods may be revoked at any time before the goods are knocked down to a purchaser (*Warlow v. Harrison*, 1859, 1 El. & El. 309; *Manser v. Back*, 1848, 6 Hare, 443; 77 R. R. 187), and that of a broker to buy or sell goods, at any time before the contract of purchase or sale is complete and enforceable (*Farmer v. Robinson*, 1805, 2 Camp. N. P. 338 *n.*). So, the authority of an insurance broker to effect a policy of marine insurance may be revoked after the slip has been signed by the underwriters,

the contract not being binding until the execution of the policy (*Warwick v. Slade*, 1811, 3 Camp. N. P. 127; 13 R. R. 772). Authority to pay money may be revoked at any time before it is actually paid away, or the agent has become personally liable to pay it (*Taylor v. Lendey*, 1807, 9 East, 49; *Edgar v. Fowler*, 1803, 3 East, 222; 7 R. R. 433; *Taylor v. Bowers*, 1876, 1 Q. B. D. 291; *Gibson v. Minet*, 1824, 9 Moo. K. B. 31; *O'Sullivan v. Thomas*, [1895] 1 Q. B. 698).

The revocation or renunciation of an agent's authority operates without prejudice to any claim for damages that either the principal or the agent may have against the other for breach of the contract of employment. A contract of agency, however, is determinable at will, in the absence of agreement, express or implied, to the contrary (*Alexander v. Davis*, 1885, 2 T. L. R. 142; *Henry v. Lowson*, 1886, 2 T. L. R. 199; *Motion v. Michaud*, 1892, 8 T. L. R. 447). Where the principal has held out the agent as having authority to act on his behalf, he is bound by the acts of the agent, notwithstanding the revocation of the authority, with respect to any third person dealing with him on the faith of such holding out, without notice of the revocation, third persons, in such a case, being entitled to assume that the authority will continue until they receive notice of its determination (*Trueman v. Loder*, 1840, 11 Ad. & E. 589; 52 R. R. 451; *Stavelly v. Uzielli*, 1860, 2 F. & F. 30; *Aste v. Montague*, 1858, 1 F. & F. 264; *Marsden v. City and County Assurance Co.*, 1865, L. R. 1 C. P. 232).

Crimes by Agent.—In English law agency is no defence in crime. An innocent agent is treated as a mere irresponsible means by which the principal commits the crime. The same rule applies where the agent is from youth (see AGE, PRESUMPTIONS AS TO), defect of understanding (see LUNACY), ignorance of fact, or other cause, not criminally responsible for the act which he has been set to do (*R. v. Butcher*, 1849, 28 L. J. M. C. 14); and where a wife commits an offence in the presence of her husband, in which event she is held to act under his coercion (*Arch. Cr. Pl.*, 21st ed., 26-28). A guilty agent is liable as a principal offender, and cannot plead his employment, even under the Crown, as any answer in law.

The importance of the rule has been historically greatest in cases where the offence consisted in an illegality perpetrated by order of the Crown or high official (see Beven, *Negligence*, 2nd ed., 256-294), and its existence distinguishes the English law from the continental system of *droit administratif* (Dicey, *Law of the Constitution*, 4th ed., cc. v. xii.). An agent who commits a crime in execution of his instructions, may render his employer civilly liable (*Dyer v. Munday*, [1895] 1 Q. B. 784); but unless the crime was the direct or natural and contemplated result of his instructions, the employer incurs no criminal liability except under certain special statutes, such as those relating to licensed dealers in alcohol or to the sale of food or drugs (*Kearley v. Tonige*, 1891, 60 L. J. M. C. 159; *Brown v. Foot*, 1892, 61 L. J. M. C. 110; *Commissioner of Metropolitan Police v. Cartwright*, [1896] 1 Q. B. 655). As to crimes by commercial agents, see FACTOR.

See also FACTOR; BROKER; BROKER (INSURANCE); AUCTIONEER; ESTATE AND HOUSE AGENT; INSURANCE (LIFE); STOCK EXCHANGE.

[*Authorities.*—Bowstead on *Agency*, 3rd ed.; Story on *Agency*; Evans on *Principal and Agent*; Campbell on *Commercial Agency*.]

PRECEDENTS.

I. *AGREEMENT to EMPLOY an AGENT in a Colony at a Salary, with a Percentage on Sales.*

THIS AGREEMENT, made this day of 19 .

Parties. BETWEEN [*merchants*], of, &c., of the one part, and [*agent*], of, &c.,
Testatum. commercial agent, of the other part: WHEREBY it is agreed by and
between the parties hereto as follows:—

Interpretation clause. 1. In this agreement the term "the agent" means the said [agent], and the term "the principals" includes the said [merchants], and the survivors or survivor of them, and such person or persons as may from time to time be copartner or copartners in trade with them, or the survivors or survivor of them, and their respective executors, administrators, and assigns.

Engage-
ment of
agent for a
fixed term.

2. The principals shall employ the agent as their agent, to take care of, conduct, and manage a certain store or warehouse, belonging to the principals, situate at _____, in the British settlement called _____, with full and free power and liberty to buy, sell, barter, or exchange any merchandise, stock, cattle, timber, colonial produce, manufactures, corn, hay, or any other article the agent may deem or consider profitable to the interest and benefit of the principals, from the _____ day of _____ now next ensuing, for and during the term of _____ years.

Salary. 3. The principals will, during the said term, pay to the agent for the services the annual salary of £ , by equal quarterly payments on the day of , &c., in each and every year, without any deduction except for income tax, and will make the first payment of the said salary on the day of .

Commission on sales beyond a certain value.

Additional salary in lieu thereof, if sales fall short of a certain amount.

annual salary of £ : AND FURTHER, that if after the expiration of the said first year of the said term of years, the sales to be effected by the agent shall not produce more than the sum of £ , The principals do hereby further agree to pay and allow to the said agent during the remainder of the said term of years, as a remuneration for his exertions, the annual salary of £ , in addition to the aforesaid annual sum of £ , to be paid and payable at the same times, and in the same manner as is hereinbefore appointed and provided for payment of the said annual salary of £ ; And which annual salary or salaries, and percentage, the agent shall and may be at liberty to deduct and retain, by and out of the first moneys which shall come to the hands of or be received by him.

Agent may retain salary.

Agent may retain salary. salary of £ ; And which annual salary or salaries, and percentage, the agent shall and may be at liberty to deduct and retain, by and out of the first moneys which shall come to the hands of or be received by him.

4. The principals will, at their own proper costs and charges, find and provide for the agent all kinds of goods, wares, merchandises, and other articles and things of every nature and description whatsoever, which he may demand or deem requisite for the carrying on

and conducting the said store or warehouse, or otherwise in the execution, conduct, or management of his office as such agent as aforesaid, so as he may be enabled to effect sales, and manage, conduct, and carry on the said store or warehouse to the greatest advantage and benefit of the principals.

Agent may reside in adjoining house with his family without paying rent.

Principals to furnish house.

Principals to provide clerks, &c.

Principals to provide board and lodging for agent's family, clerks, &c.

Agent to deduct expenses.

Principals to send out agent with his family and goods at their expense.

Agent may determine agreement on giving notice.

Principals to bring agent and family and goods home.

5. The agent and his wife, family, and servants, shall and may be at liberty to reside in and have the use and occupation of the dwelling-house, and all other the premises, with the appurtenances, now the property of the principals, which adjoin or belong to the said store or warehouse, without paying any rent for the same; and which dwelling-house the principals hereby undertake and agree, by and at their own costs and charges, to furnish, with suitable household and other furniture of every nature and description whatsoever, to the approbation of the agent.

6. The principals will, at their own proper costs and charges, find and provide the agent with suitable assistants, servants, and workmen, to be under and assist the agent in the business of the said store or warehouse, and in and about the exercise of his office, as agent to the principals.

7. The principals will also find and provide the agent and his wife, family, and servants, and all servants and workmen, both male and female, who may be so as aforesaid employed by the agent to assist under him, with suitable board and lodging, and everything necessary or incident thereto: And all such sum and sums of money, costs, charges, and expenses which may be incurred or sustained in the providing of such board and lodging, and also in the payment of all assistants, servants, workmen, and other persons' wages who may be employed for the purposes aforesaid, the agent shall be at liberty to deduct, retain, and reimburse by and out of the first moneys which shall come to his hands.

8. The principals will, at their own costs and charges, convey the agent, and his wife, family, and servants, and any household or other furniture, goods, chattels, property, or effects which the agent or his family or servants may think proper to take with them to the said island; and also will pay all railway and other fares, and hotel and other expenses of and incident to any journeys which the agent shall at any time hereafter be required by the principals to take for the purposes of their said business.

9. In case the agent should not approve of the situation as agent to the principals in the said island, or in case the climate should not agree with the health of himself or family, the agent shall and may, upon giving notice in writing to the principals, be at liberty to give up his employment as such agent as aforesaid, and return to England, and then, and in such case, these presents, and every clause, matter, and thing herein contained shall cease, determine, and be utterly void, to all intents and purposes, any thing to the contrary thereof in any wise notwithstanding; and in such case the principals will, upon the expiration of such notice, so to be given as aforesaid, at their own proper costs and charges, reconvey the agent and his wife, family, and servants, and any goods, chattels, property, or effects

they may think proper to bring back again with them, to the port of London.

10. The agent will, during the said term of _____ years, if he shall so long live, well, diligently, and faithfully, to the utmost of his power, serve the principals, as their agent, and take upon himself the care, conduct, and management of their said trade, of merchandising at the said store or warehouse; And will, at all times during the said term, receive and take into his care and custody, all such goods and merchandises whatsoever as aforesaid, and as by or for the use, or on the account of the principals shall be conveyed or sent to the agent, and will sell, barter, and dispose of the same goods and merchandises to the best profit he can for the principals; And also will, at all times during the said term, follow and perform the advice, direction, and orders of the principals, which shall, by letters or otherwise, be sent, given, or made known to him the agent, concerning the said store or warehouse and merchandises as aforesaid.

11. The agent will, at the costs of the principals, provide and keep in good order books of account, concerning his employment as such agent as aforesaid, according to the custom of agents to merchants in such cases: And will deal justly, truly, and faithfully to and with the principals in all and every his accounts, reckonings, bargains, and dealings, relating to and concerning his said employment as such agent as aforesaid; And will constantly, once in every year during the said term of _____ years, determinable as aforesaid, transmit and send to the principals true accounts of all the business and dealings of him the agent in the premises; And also will send letters of advice to the principals of all such measures and occurrences wherewith it shall be proper and expedient that the principals be acquainted.

12. The agent will, from time to time, upon every reasonable request of the principals, show forth and produce to them, or either of them, all his books of account, concerning all such his dealings aforesaid, and make and give to them a just and perfect account of and concerning all and every such goods, wares, money, and merchandises of the principals which shall hereafter come to his hands and charge, or for which he should or ought to be accountable to the principals; and, moreover, that he will, within _____ months after such annual account shall be made or given in, well and truly satisfy and deliver over to the principals all and every such wares, money, goods, merchandises, and other effects and things, as by such account shall appear to be due to the principals from the agent.

AS WITNESS, &c.

II. *AGREEMENT to EMPLOY a FACTOR, to be remunerated by a Share of Profits, with weekly Drawings.*

AN AGREEMENT, made the _____ day of _____ 19____,
BETWEEN [*factor*], of, &c., of the one part; and [*four copartners*

Agent to act diligently and faithfully during term.

To receive goods, and dispose of goods.

To obey directions of principals.

To keep books of account.

To deal justly.

To transmit accounts annually.

To advise principals of all important matters.

To produce books of accounts on request.

To render goods or moneys due.

Parties.

Recital of agreement to act as factor.

principals], all of, &c., of the other part. WHEREBY it is agreed by and between the said parties hereto as follows, that is to say :—

Interpretation clause.

1. In this agreement the term “the factor” means the said [*factor*], and the term “the principals” includes the said [*principals*], and the survivors, and survivor of them, and such person or persons as may from time to time be copartner or copartners in trade with them, or the survivors or survivor of them, and their respective executors, administrators, and assigns.

Agreement to act as factor for years.

2. The factor will act as the factor or agent of the principals in the vending of _____, for the term of _____ years from the date hereof, determinable nevertheless as hereinafter mentioned, and will conduct and carry on the said agency, at the shop or warehouse of the principals, in _____ Street, in the City of London, or in such other shop or warehouse, in the said City of London, as they may direct or appoint for that purpose.

Conduct of business.

3. The factor will devote and give his whole time and attention to the said agency, and will not engage in the business of a seller of _____, or in any other business whatsoever, either on his own account, or as a factor or agent, and either alone or in copartnership with any person or persons whomsoever.

To take care of the goods committed to his charge.

4. The factor will carefully deposit and preserve, in the shop or warehouse for the time being made use of for the purpose of the said agency business, all such goods, wares, and merchandises, as may be sent or transmitted to him by the principals.

To procure best sale for ready money or to persons of good credit.

5. In managing and conducting the said agency, the factor will use his best endeavours to procure the greatest possible sale of the _____ and other goods which he shall be employed to sell as such factor as aforesaid, either for ready money, or to persons whom, after due inquiries, he shall ascertain to be persons of responsibility, and worthy to be trusted ; And, upon making every such inquiry, will make a minute or memorandum thereof, in a book to be kept for that purpose, specifying the name of the person applying to purchase on credit, the name or names of the person or persons applied to for the purpose of knowing whether such person might be trusted with safety, and also specifying what was said upon the subject by such person or persons so applied to.

Limits as to giving credit.

6. The factor will not give credit to any person or persons for a greater length of time than _____, without the consent in writing of the principals ; And will not, without such consent, sell to any person on credit to a greater amount than the sum of £ _____.

To act according to directions of principals. In absence of special orders to act for benefit of principals.

7. The factor will, in conducting the said agency, conform to and govern himself by such orders, instructions, and directions, as he may from time to time receive from the principals ; And that in all cases where he shall receive no special orders or directions, he will act in such manner as he shall judge to be most conducive to the advantage of the principals.

To account for and transmit

8. The factor will, from time to time, account for and transmit to the principals all moneys, bills, and securities for money, received

moneys, &c., from the sale of any , or other goods sold by the factor, received to principals. as such factor or agent as aforesaid.

To accept principals' bills when he has assets in hand. 9. The factor will, from time to time, in case he has assets in his hands, accept and duly pay all such bill and bills of exchange as may be drawn upon him by the principals, and of which he may receive due notice from them, or the survivors or survivor of them.

To transmit monthly account of affairs to principals. 10. The factor will, from time to time, on the first day of every month, send and transmit to the principals a full, clear, and correct statement in writing of all orders, both taken and executed, and of all goods which may have come to his hands ; and also of all such goods as he may have sold, to whom, and whether for ready money, or on credit ; and likewise of all such other matters, transactions, and things, as in anywise concern the said agency business, and which may have taken place during the preceding month.

To keep account books. 11. The factor will keep books of account, in which shall be made plain and correct entries of all goods received from the principals, and also of all goods sold and delivered by him, the factor, as such factor or agent as aforesaid, and also of all orders received and taken ; and of all other matters, transactions, and things, in anywise concerning the said agency business ; And will, on the day of , and the day of , in each and every year, unless either the said days shall happen on a Sunday, and in that case on the day following, accurately cast up and balance the said books of account, in order that the true state of the said agency business may clearly appear therefrom.

To balance account books every half-year. 12. It shall be lawful for the principals, or any of them, at all seasonable hours in the day-time, to have free access to the said books of account, and to all other books, papers, documents, and writings in anywise touching or concerning the said agency business ; and to take copies of or extracts from the same or any of them ; And which books of account, papers, documents, and writings, he, the factor, will carefully preserve (damages by fire and other inevitable accidents only excepted) ; and, upon the final settlement and winding up of the said agency business, will give and deliver up the same books, documents, and writings, undefaced and unobliterated, to the principals, or other the person or persons lawfully entitled thereto.

Principals to have access to inspect the accounts, &c. Account books to be carefully preserved. 13. Upon the taking of every half-yearly account, as provided by the clause hereof, a copy of such account, signed by the factor, and verified by the statutory declaration of himself, or of the person or persons whom he shall have employed to make up the said account, shall be forwarded to the principals, and shall, unless the principals, or any of them, shall within days after the receipt thereof object to the same, and notify such objection in writing to the factor, be deemed to be finally settled and binding upon the parties hereto respectively.

Copies of accounts to be forwarded to principals. Factor entitled to share of gross profits. 14. Upon the settlement of each half-yearly account the factor shall be entitled to receive one th share of such sum as shall by such account be shown to represent the gross profits of the business carried on at the shop or warehouse of the principals at Street aforesaid, for the preceding half-year.

Weekly
drawings.

15. The factor may every week, during such time as he shall act as such factor or agent as aforesaid, draw out for his own use, on account of his share in the said gross profits, the sum of £ ; but if at the end of any half-year it shall appear, upon taking the half-yearly account as aforesaid, that the share of gross profits, to which he is entitled at that date, does not amount to the aggregate of the weekly drawings made by him during the then preceding half-year, then he shall within days after such account shall have been taken as aforesaid, refund the difference, but without interest.

Factor to
reside in
rooms over
warehouse,
rent free.

16. The factor, during such time as he shall act as such factor or agent as aforesaid, shall have the exclusive right, with his family and servants, to reside in the dwelling-house, with the appurtenances, over the said shop or warehouse, in Street aforesaid, free from the payment of rent or taxes for the same.

Factor to
provide a
clerk and
porter.

17. The factor will, at his own costs and charges, find and provide a clerk who writes a good hand, and understands accounts and bookkeeping, for the purpose of constantly assisting him, the factor, in the management of the said agency business: And also find and provide a porter for the purpose of assisting in the said business.

Repayment
to factor of
sums paid
for carriage
of goods,
&c.

18. The principals will pay to the factor, once every six months, all such sums of money as he may have paid, for or on account of books, paper and stationery, made use of in and about the said agency business; And also all such sums as he may have paid for the postage of letters relating to the said agency business; And for the carriage of goods, wares, and merchandises sent to him by the principals.

No other
person to be
employed as
factor.

19. The principals will not employ any other person as a factor or agent in the vending of , within the City of London, during such time as the said factor shall act as such factor or agent as aforesaid.

Factor not
to be
answerable
for involun-
tary losses.

20. The factor shall not be answerable for any loss or damage which may happen to or be incurred in or about the said business conducted by him as such factor or agent as aforesaid, unless such loss or damage happen through his wilful neglect or default.

Power for
factor to
determine
agreement
on giving
months'
notice.

21. In case the factor shall, at any time before the expiration of the said term of years, be desirous of giving up the said agency business, it shall be lawful for him so to do, upon giving six calendar months' previous notice in writing of such his intention to the principals, or by leaving such notice at their usual places or place of abode.

Power for
principals to
discharge
factor, on
giving
months'
notice.

22. If the principals shall, at any time before the expiration of the said term of years, be minded and desirous to discharge the factor from being such factor or agent as aforesaid, it shall be lawful for them so to do upon giving six calendar months' previous notice in writing of such intention, or upon leaving such notice at the shop or warehouse for the time being made use of by the factor in the said agency business, anything herein contained to the contrary notwithstanding.

Proportion-
ate allow-
ance in lieu
of profits
in case of
death, &c.

23. In case of the death of the factor before the expiration of the said term of seven years, or of his resignation or discharge as hereinbefore provided, his executors or administrators, or himself, as the case may be, shall immediately upon the happening of any such event be entitled to receive a proportionate allowance in lieu of profits, to be calculated as from the last preceding half-yearly account-taking, and according to the share of profits (if any) of the factor as shown by the same account-taking. If at the time of the happening of any such event as in this clause mentioned no half-yearly account shall have been taken, a special account shall be taken for the purpose of ascertaining the allowance to be made.

Arbitration
clause.

24. If at any time the principals or any of them shall object to the half-yearly accounts rendered and forwarded to them in manner aforesaid, or if any dispute or difference shall at any time arise between the factor or his executors or administrators, on the one part, and the principals or any of them, on the other part, for or on account of any matter or thing herein contained which shall not within one calendar month after the same shall arise be fully decided between the parties in difference themselves, then and in every such case, the matter of every such account, difference or dispute shall be referred to the hearing of three indifferent persons, to be chosen, one by the factor or his executors or administrators, another by the person or persons in difference or dispute with him or them, and a third by the first two persons so chosen; And the award and determination of the said three persons so to be chosen as aforesaid, or any two of them, in the matter referred to them, shall be binding and conclusive.

Power of
attorney for
factor to
recover
debts.

25. And for the purpose of better enabling the factor to receive and get in all debts and sums of money for or on account of any goods, wares, and merchandises which may be sold by him as such factor or agent as aforesaid, they, the principals, by these presents, appoint the factor their attorney for them, and in their names or otherwise, and for their use, to ask, sue for, recover and receive, all and every such sum or sums of money as shall or may be due or owing from any person or persons, for or on account of any goods or merchandises sold by him or their agent or factor as aforesaid, and to give receipts and sufficient discharges for the same; they, the principals, hereby ratifying and confirming all and whatsoever he, the factor, shall lawfully do or cause to be done in and about the premises; and any attorney or attornies under him, the factor, to substitute and appoint, and such substitution and appointment at pleasure to revoke.

No partner-
ship
created.

26. Nothing herein contained or to be done in pursuance hereof shall be construed or taken in any way so as to constitute a partnership between the factor and the principals, or so as to give to or impose upon the factor any of the rights or liabilities of a partner in the same business.¹

¹ This clause is merely declaratory, as this agreement does not create a partnership. See Bovill's Act, 28 & 29 Vict. c. 86, s. 2.

III. *AGREEMENT under SEAL between a Firm of Traders and an Agent for the Sale of Goods. Provisions for Payment of Commission. For determining Agency, and for restraining Agent from carrying on a similar Business, and other Clauses. A Full Form.*¹

THIS INDENTURE, made the day of 19 ,

Parties. BETWEEN A., *agent* (hereinafter called the agent) of the one part, and B., C., and D., *principals*, carrying on business in partnership together as , under the style or firm of B. & Co., at, &c., or, "Messrs. B. & Co., &c." (hereinafter called the principals), of the

Recital. other part. WHEREAS the agent has agreed to become the agent of the principals in London for the sale of manufactured or supplied by them upon the terms and in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that it

Mutual covenants. is hereby covenanted and agreed by and between the said parties hereto as follows:

Firm to supply goods.² 1. THE principals shall, from time to time during the term of years from the day of next [last past]³ (if the agent shall so long live), [ship], consign, and supply at their own costs and charges to the agent with as little delay as may be after they shall have received from him a notice or order in writing for the same (unless they shall be prevented by some just and sufficient cause), such quantities and descriptions of or other goods or merchandise which are now, or shall for the time being be manufactured or dealt in by the principals, as the agent shall require, or, "as will keep up a stock in the hands of the agent to the value of £ ."

To be disposed of by agent. 2. THE agent shall, during the term aforesaid, receive all such goods and merchandise as shall be consigned or supplied to him by the principals as aforesaid, and shall use his best endeavours to sell and dispose of the same to the best advantage, and for the best prices that can be obtained for the same, not being less than such prices, if any, as may from time to time be fixed by the principals, and either for ready money or to persons of good credit: AND shall in the meantime keep the same deposited in warehouses or other proper places, and shall twice in every year, as hereinafter mentioned, duly account with the principals for, and pay over or remit to them all moneys, bills, notes, and securities, which shall have been received by, or come to the hands of the agent, from or in respect of the sale or disposition of the said goods or merchandise, after deducting the expenses and allowances and other deductions hereinafter mentioned.

Proceeds to be re-mitted half-yearly.

¹ As to agreements of this nature, see the Factors Act, 1889, 52 & 53 Vict. c. 45; Goodeve P. P., p. 76.

² See *Bunning v. Lyric Theatre*, 10 T. L. R. 583; and see *Turner v. Sawdon & Co.*, [1901] 2 K. B. 653, as to employment.

³ It will be convenient that the accounts of the agency should be settled in every year in time to allow of their incorporation in the accounts of the firm.

Provision
for omis-
sion to
supply
goods.

[3. IN case the principals shall at any time during the subsistence of this agreement from any cause whatever, fail or omit to supply the agent with such goods or merchandise as aforesaid within weeks after receiving a notice or order in writing from him for the same, the agent may thereupon purchase or obtain from any other person or persons such goods or merchandise as he shall require, and which the principals shall so have failed to supply: PROVIDED that the agent shall duly account, at the times and in manner hereinafter provided, for all the net profits to arise from the sale thereof, after deducting the first cost or price of the same, expenses, commission, and such other deductions and allowances as hereinafter mentioned.]

Expenses.

4. THE principals shall allow or pay to the agent so long as he shall continue to be their agent under this agreement, all reasonable expenses for carriage or delivery of the said goods or merchandise, and for books, stationery, and postage, and all other reasonable and customary expenses attending the sale thereof, or otherwise incurred by him in respect of the premises [save as herein otherwise provided]: AND shall also allow or pay him a commission or salary at the rate of £ per cent. upon the [net] proceeds which shall arise from the sale of all such goods or merchandise as aforesaid [after deducting expenses], such commission to be chargeable upon moneys actually received only, and not upon outstanding debts: [AND in case such commission shall, upon the making up of any half-yearly account as hereinafter mentioned,¹ be found to amount to a less sum than £ for the preceding half-year, then the agent shall be entitled to retain or be paid such a further sum in addition to the said commission as will make the same up to such sum of £]: AND it is hereby agreed that the commis-

Commis-
sion.

Lien.

sion and allowance aforesaid, and all sums of money whatsoever which may from time to time be or become due or owing from the principals to the agent, shall be a lien or charge² upon all goods, merchandise, and property of the principals, which shall, for the time being, be in the possession or custody of the agent.

Clerks.

5. THE agent shall, out of his said salary or allowance, provide and pay all clerks and assistants who may be required by him for the management of the said agency business.

Accounts.

6. THE agent shall keep all usual and proper books of account of and concerning all goods and merchandise received by him from the principals [or purchased or obtained by him from any other person or persons under clause 3], and the particulars of the sales thereof, and of all sums of money, bills of exchange, and other securities received by him, and of all credit given on account of any such goods, and of all other measures and transactions concerning the

¹ If only a comparatively short period will elapse before the first account directed to be taken by Clause 7, add here "not, however, including the account hereinafter directed to be taken upon the day of next."

² That this will not make the document a bill of sale within the Act of 1882, see *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352. See as to bills of sale the note in Vol. II., MORTGAGES; Goodeve, P. P., p. 93.

premises, and the said books and accounts, and all bills, notes, securities for money, letters, and other writings relating to the measures aforesaid in the possession or under the control of the agent, shall be carefully preserved by him (damage by fire, or other inevitable accident only excepted) and shall at all reasonable times be open to the inspection of the principals, or any member of their firm, or their agents, who shall have full liberty to make copies or extracts of or from the same or any of them.

Inspection.
Settle-
ment of
accounts.

7. THE said parties shall, on the day of next, and thereafter during the continuance of this agreement, on the day of and the day of in every year (unless prevented by sickness or other unavoidable cause, and then as soon as may be after the removal of such cause), settle accounts respecting the sale and disposition of the said goods and the other measures aforesaid. [AND upon the settlement of accounts, interest at the rate of £ per cent. per annum may be charged by or against the agent upon all unpaid balances, and for the purpose of such half-yearly settlement of accounts a full and particular statement in writing shall previously to every such day as aforesaid be prepared by the agent showing all receipts and payments and other dealings and transactions concerning the premises, and every such account or statement, when approved and signed by the said parties, shall be binding upon them and every of them, and shall not afterwards be opened unless some manifest error or omission shall be discovered therein within the space of twelve calendar months thereafter, in which case the same shall be rectified.]

Monthly
statements.

8. THE agent shall on the first day of every month transmit to the principals a statement in writing of the goods which may have come to his hands and of all orders received by him, and the particulars of all sales and other transactions which shall have taken place during the preceding month.

Agent
to accept
bills.

9. THE agent shall accept and duly pay all such bills of exchange as may be drawn upon him by the principals, to the amount of the balance he may have in hand, on having three days' previous notice given to him thereof.

Agency
not to be
assigned.

10. THE agent shall not at any time without the consent in writing of the principals assign, transfer, or in any manner make over the said agency or this present contract to any person or persons whomsoever: AND the agent, his clerks, agents, and servants, shall not, nor shall any of them, during the continuance of the said agency, without such consent as last aforesaid, directly or indirectly, sell or dispose of any or other goods or merchandise of the description aforesaid, for or on account of the agent or any person or persons whomsoever, other than the principals. THE agent, his clerks, agents, and servants, shall not, nor shall any of them, during the continuance of the said agency, without such consent as aforesaid, directly or indirectly, buy, sell, or deal in , or any of the goods or articles which are now or shall for the time being be usually dealt in by the principals, or carry on the business or trade of, &c., [carry on any business or trade what-

Agent not
to carry
on other
business
of the same
kind.

Agent not to carry on any other business.
Principals not to employ any other agent in same place.

soever,] for or on account of the agent or any other person or persons whomsoever, other than the principals [but the agent shall devote his whole time and attention to the said agency business]: AND the principals, their clerks, servants, and agents, shall not, nor shall any of them, during the period aforesaid, without the consent in writing of the agent, supply any such goods or merchandise as aforesaid, whether for resale or otherwise, to any person or persons whomsoever, who shall reside or carry on business in the town of aforesaid, or within the distance of _____ miles from *some public building or other place in the town*, other than the agent.

Limit as to credit to be given.

11. THE agent shall not give credit to any person or persons whomsoever for a longer period than _____, nor for any goods or merchandise exceeding the value of £ _____, without the consent in writing of the principals, and shall not give credit for any goods or merchandise to any person or persons to whom they shall have forbidden him to give credit.

Not to pledge.

12. THE agent shall not without the consent in writing of the principals pledge any goods or merchandise consigned or supplied to him as aforesaid.

Agent not to compound debts, &c.

13. THE agent shall not, without the consent of the principals, realise or compound any debt, claim, obligation, or security relating to the premises, nor abandon or compromise any action, suit, or other proceeding for compelling the payment or satisfaction of any such debt, claim, or obligation, or realising or enforcing any such security as aforesaid, nor execute nor do any instrument or thing whereby any such debt, claim, security, or obligation may or might be discharged, diminished in value, or prejudicially affected, until the same shall have been fully paid or satisfied.

To obey directions of principals.

14. THE agent shall at all times during the continuance of the said agency obey and observe all reasonable directions and instructions which may be given to him by the principals, touching the sale or disposition of the said goods, or otherwise relating to the premises, and in the absence of special instructions shall act in such manner as he shall deem most beneficial to them.

To deliver up goods, &c., on winding up of agency.

15. THE agent shall, upon the final winding up of the said agency business, deliver up to the principals all such of the goods and merchandise aforesaid, as shall remain unsold, and also all books and accounts which shall have been kept by the agent as aforesaid, and all documents and writings relating to the measures aforesaid, which shall be in his possession or power.

Power to terminate agency.

16. IT shall be lawful for either the principals, or the agent, at any time during the said term of _____ years to terminate the said agency by giving _____ calendar months' notice in writing to the other party, or leaving such notice at, or sending the same by post or otherwise to the usual or last known place of abode or business of such party addressed to him or them: [PROVIDED that in case either of the said parties shall at any time wilfully neglect or refuse to observe or perform any of the agreements or stipulations aforesaid it shall be lawful for the other party to terminate the said agency upon giving one week's notice in writing to him or them, or

leaving or sending the same as aforesaid.] AND any notice hereinbefore required to be given to the principals may be addressed to the said firm by its then name or style, or to any member thereof, and upon the expiration of the period of any such notice as aforesaid, the said agency shall accordingly absolutely cease, and the accounts of the said agency business shall thereupon be adjusted and settled between the said parties up to the day on which such notice shall have expired, in the same manner as if the said agency had expired by lapse of time.

Agent not to
be answer-
able for
loss.

17. THE agent shall in nowise be answerable for any loss or damage which may happen to any such goods or merchandise as aforesaid, or which may otherwise be incurred in or about the measures aforesaid, unless the same shall be occasioned by his wilful neglect or default.

Agreement
not to be
affected
by change
in firm.

18. THIS agreement shall not be affected by any change which may take place in the firm of the principals by the death or retirement of any member or members thereof, or the admission of any new member or members, or any alteration in the name or style of the said firm or otherwise, so long as the said present members thereof, or any of them, shall continue partners or a partner therein.

Power of
attorney
to agent.

19. FOR further effectuating this agreement, the principals do hereby appoint the agent to be the attorney of the principals and of the persons or person for the time being constituting their firm or carrying on the said business, for them or him, and in their or his names or name to demand, sue for, recover, and receive, and give effectual receipts and discharges for all such sum or sums of money as shall be due from any person or persons in or elsewhere, for or on account of any goods or merchandise sold by the agent as aforesaid, and generally to do all such acts, and things as may be necessary or proper in relation to the measures aforesaid (but subject nevertheless to the stipulations and agreements hereinbefore contained as to compromising claims and otherwise), with power to the agent to appoint a substitute or substitutes under him for any of the purposes last aforesaid, or for any measures relating to the said agency business, with such powers as he shall think fit, and such appointment at pleasure to revoke, and the principals hereby agree to ratify and confirm whatsoever the agent or his substitute or substitutes shall lawfully do or cause to be done in and about the premises.

Arbitration.

20. IN case any question or dispute shall at any time during the continuance of the said agency or afterwards arise between the agent, his executors or administrators and the principals or their firm for the time being, with respect, &c., *Arbitration clause.*
See

Principal and Surety.

TABLE OF CONTENTS.

CONTRACT OF PRINCIPAL AND SURETY	557	RIGHTS OF SURETY ON BANKRUPTCY OF	
WHO IS A SURETY?	557	PRINCIPAL	560
RIGHTS OF SURETY AGAINST PRINCIPAL	557	Old Law on the Subject	560
Before Payment	557	Effect of Sec. 37 of Bankruptcy	
Right of Indemnity	557	Act, 1883	560
RIGHT OF SURETY AFTER PAYMENT	559	RIGHTS OF SURETY ON DEATH OF	
VOLUNTARY PAYMENT	559	PRINCIPAL	561
PRINCIPAL AS THIRD PARTY	559	Administration	561
IMPLIED AUTHORITY	559	RETAINER OF EXECUTOR-SURETY	561
		SURETY OF MORTGAGOR	562

CONTRACT OF PRINCIPAL AND SURETY.—The contract of principal and surety, sometimes called the contract of guarantee, has been defined and treated of at length under the title GUARANTEE, and for the law on the subject generally, and the rights and liabilities of the parties to such a contract, it will be sufficient to refer the reader to that article, restricting ourselves here to dealing only with the rights of principal and surety *inter se*.

WHO IS A SURETY?—Surety in the unrestricted and proper sense of the term includes anyone who, whether gratuitously, or for a consideration, is liable to answer for the debt or default of another; that other person is primarily liable, and is called the principal. There is no privity of contract between principal and surety, and consideration between them is therefore unnecessary. [But a surety is not bound if he sign an instrument of suretyship which shows on its face the intention that another or others were to be co-sureties with him, and such other or others do not sign (*Evans v. Brembridge*, 1855, 2 K. & J. 174; 69 E. R. 741; *National Provincial Bank v. Brackenbury*, 1906, 22 T. L. R. 797).]

RIGHTS OF SURETY AGAINST PRINCIPAL.—*Before Payment*.—The rights of the surety against the principal may arise and be enforced even before actual payment of the debt by the surety. He is entitled, as soon as the principal has made default, if the creditor refuses to sue, to go to a Court of equity, and with its aid compel the debtor to pay off the debt, and discharge his liability (*Antrobus v. Davidson*, 1817, 3 Mer. 569; 36 E. R. 219; 17 R. R. 130; *Wooldridge v. Norris*, 1868, L. R. 6 Eq. 410). [The principal cannot (notwithstanding that the surety has not been called upon to pay) by suffering judgment and execution for another debt affect a collateral security to which, if the surety paid he would be entitled (*Dixon v. Steel*, [1901] 2 Ch. 602).]

Right of Indemnity.—Further, the relationship of principal and surety implies in the law a contract by the principal to indemnify the surety for any damage he may sustain from such relationship (*Toussaint v. Martinant*, 1787, 2 T. R. 100). And equity will compel specific performance of this contract to indemnify—or, in other words, will enforce the surety's right of indemnity—even before there has been any such breach of the contract as would be necessary to support an action at law. The surety is "entitled to be relieved from liability; . . . he need not pay, and perhaps ruin himself, before seeking relief" (*Johnston v. Salvage Association*, 1887, 19 Q. B. D. 458).

Although, in accordance with the doctrine in *Wooldridge v. Norris*, *supra*, it may be laid down as an accepted proposition that the surety need not have actually paid anything in order to be entitled to an indemnity from the principal, nevertheless there are cases wherein the Court has refused to give an indemnity before the contingency which creates the damage has arisen—looking upon the claim of the surety as merely a *quia timet* action, which demands an indemnity against a liability that may never come into existence. On this principle, the Court has refused to declare prospectively the right of the assignor of a long lease to be indemnified by the assignee against future breaches of covenant by the latter (*Lloyd v. Dimmack*, 1877, 7 Ch. D. 398), and also has refused to compel a *cestui-que trust* to indemnify his trustee against calls on shares in a company in liquidation, there being no evidence to show whether calls were likely to be made in the winding-up (*Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 1882, 22 Ch. D. 561). But in spite of the two decisions (both of Fry, J.) above noticed, the Courts in several recent cases have leant very strongly in favour of giving the surety an early right of indemnity. The last-quoted case was distinguished in *Hobbs v. Wayet*, 1887, 36 Ch. D. 256, the trustee in that case being declared to be entitled to an indemnity in respect of calls on shares of a company in liquidation, on which calls would be made on the shareholders, even though the surety was not yet on the list of contributories, and no call had as a fact been made; “I think that a man who accepts a liability,” said the Court, “and who is therefore entitled to be indemnified directly the cloud appears . . . however small that cloud may be, is entitled to go to the man who made the request, [*i.e.* that the liability should be accepted], and say, ‘I am entitled to be indemnified;’ and if the right to indemnity is denied, he has a right to come to this Court and obtain a declaration that he or his testator’s estate is entitled to be relieved from that liability” (*per Kekewich, J.*, *loc. cit.*, at p. 259). The principle, as last stated, is further supported by the decision in *Wolmershausen v. Gullick*, [1893] 2 Ch. 514, that a surety against whom the principal creditor has obtained judgment for the full amount of the guarantee, may, even before actual payment, demand contribution from his co-sureties, a question with regard to which there had hitherto been, as stated in the judgment, a remarkable absence of express authority. The allowance of the claim of the principal creditor against the estate of the deceased surety is, for the purpose of the right to indemnity, considered as equivalent to a judgment [and the Statute of Limitations begins to run as between co-sureties and as between a trustee and his *cestui-que trust* when the liability is ascertained (*S. C.*; *Robinson v. Harkin*, [1896] 2 Ch. 415)].

It has been clearly laid down that, at all events in equity, the right of indemnity may be exercised against liability as well as loss; see *Lacey v. Hill*, 1874, L. R. 18 Eq. 182, where Jessel, M.R., said: “It is said this is a liability as distinguished from an annual payment, and that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law (as to which I say nothing, because it is not necessary), it is quite plain that in this Court anyone having a right to be indemnified, has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over

to him. As to the observation that he may compromise for less, the answer is, that the person liable to indemnify can go to the creditor and set him right."

RIGHT OF SURETY AFTER PAYMENT.—Once the surety has discharged the debt of his principal, or any part of it, he becomes a creditor of the principal for the amount paid. The money paid having been paid at the request and for the use of the principal, it is recoverable as such. "The surety has a right of action against the principal the moment he pays anything for so much money paid to the latter's use" (*Davies v. Humphreys*, 1840, 6 Mee. & W. 153; 55 R. R. 547), and he may recover not only the sum paid, but also (by way of damages) interest thereon. The surety's right to reimbursement is both just and well established, being subject only to the well-known rule of law, that if a man voluntarily discharges the obligation of another, he has no right of action against the person originally liable. Applying this rule to cases of principal and surety, payment of a debt may be **VOLUNTARY** not only as regards the sum paid, but the time of such payment; in other words, the surety may not accelerate payment by paying the debt before it is due. Not only will the consent, actual or constructive, of the principal suffice to prevent the payment by the surety from being "voluntary" within the above rule, but it must be noticed further, that once the relationship of principal and surety has been established at the principal's request, the surety in discharging the obligation is taken to have acted on the implied authority of the principal, and such principal must indemnify or reimburse him, as the case may be. And the surety may, on being sued by the creditor, bring in his principal as a **THIRD PARTY** (see **PARTIES**). The **IMPLIED AUTHORITY** may arise from a well-recognised custom, *e.g.* it being proved to be the common and almost invariable practice of bill-brokers in the City of London not to indorse each bill of exchange which they have discounted for a customer when they rediscount with their bankers, but to give to the bankers a general guarantee for all bills which they rediscount, the drawer of an accommodation bill has an implied authority from the acceptor in discounting the bill with bill-brokers to deal with them in the ordinary course of business, and accordingly the bill-brokers have an implied authority from the acceptor to make themselves liable under their guarantee to their bankers. The surety having, on behalf of his principal the acceptor, entered into the engagement, it enures for his benefit, and thereupon, if it turns out that he must pay under his guarantee, he becomes the creditor of the principal (*Ex parte Bishop, In re Fox, Walker & Co.*, 1880, 15 Ch. D. 400).

It has been clearly established that the rights of the creditor and the right of the surety as against the principal debtor are not identical. The Mercantile Law Amendment Act, 1856, the provisions whereof have been referred to under **GUARANTEE**, abolished so much of the distinction as was prejudicial to the surety by giving him the benefit of the creditor's securities (*cp. Copis v. Middleton*, 1823, Turn. & R. 224; 29 R. R. 73, deciding that the surety was only a simple contract creditor, though the original creditor may have been so by specialty). But, on the other hand, the surety may have rights as against the principal which the creditor never had, and may accordingly be entitled to recover more under his contract of indemnity than the creditor might have recovered. And therefore, the rights being distinct, although according to the rule in *Kendal v. Hamilton*, 1879, 4 App. Cas. 504, a creditor who has recovered judgment against one partner cannot sue

another partner, the rule does not take away the rights of a surety for one partner as against another partner (*Badeley v. Consolidated Bank*, 1886, 34 Ch. D. 536).

In considering whether the right to stand in the place of a creditor was or was not the surety's only right, Stirling, J., said: "That right no doubt exists, but it is simply a part of the general right of indemnity which exists on the part of the principal debtor towards his sureties. But I think it is clear from various considerations that they have further rights. First of all they have the right to indemnity, and I take it that if a surety could prove that by reason of the non-payment of the debt he had suffered damage beyond the principal and interest which he had been compelled to pay, he would be entitled to recover that damage from the principal debtor. This shows, therefore, that more can be recovered by the surety under the contract of indemnity than could be recovered by the creditor" (*Badeley v. Consolidated Bank*, *loc. cit.*, at p. 556).

RIGHTS OF SURETY ON BANKRUPTCY OF PRINCIPAL.—Under the early law of bankruptcy the surety could only prove against the estate of the principal in respect of such debt as he had actually discharged and paid off before the bankruptcy. An Act of 49 Geo. III. c. 121, and subsequently the Bankruptcy Act, 1849, remedied the injustice, by providing that any person who at the time of issuing the fiat or filing a petition for adjudication of bankruptcy shall be surety or liable for any debt of the bankrupt, if he shall have paid the debt or any part thereof in discharge of the whole debt (although he may have paid the same after the issuing of the fiat or filing of the petition), shall, if the creditor shall have proved his debt under the bankruptcy, be entitled to stand in the place of such creditor as to the dividends and all other rights under the bankruptcy which such creditor possessed or would be entitled to with respect to such proof. If the creditor shall not have proved, then such surety is to be entitled to prove his demand in respect of such payment as a debt under the bankruptcy, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety after an act of bankruptcy committed by the bankrupt, provided he had done so without notice of the act of bankruptcy (see 12 & 13 Vict. c. 106, s. 173).

The Bankruptcy Act, 1883, contains no provisions on the subject apart from the general effect of the 37th section of the Act, and accordingly it is on that section that the right to prove in respect of a debt unpaid must be based. The early law on the subject is thus briefly stated in Baldwin on *Bankruptcy*, 7th ed., p. 445:—

"Under the earlier bankruptcy law, at all events, a surety was not entitled to prove until the whole debt was satisfied, either by payment in full or by payment of part in discharge of the whole. It was not, however, necessary that the surety should pay the whole; it was sufficient if he paid all that remained due" (*Ex parte Johnson*, 1853, 3 De G., M. & G. 218; 43 E. R. 86; *Ex parte Copplestone*, 4 Deac. 54). The reason why the surety had, beyond these cases of actual payment, no right to prove was that otherwise the bankrupt's estate would be exposed to the risk of having a double proof in respect of the same debt. But we apprehend that now, at all events, where there is no risk of such double proof being made, a surety may, in view of the recent decisions, prove against the principal's estate even before payment made in respect of his contingent liability (see *Ex parte Delmar*, *In re Herepath*, 1890, 38

W. R. 752; 7 Mor. 129, 190; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514). The decision already noticed held further, that under sec. 37 of the Bankruptcy Act, 1883, the liability of a bankrupt co-surety to contribution in respect of an unpaid debt is, though unascertained at the time of the bankruptcy proceedings, a debt proveable in bankruptcy. And in the case of *In re Paine, Ex parte Read*, [1897] 1 Q. B. 122, it was held that the word "creditor" in the section of the Act (s. 48) avoiding payments by way of fraudulent preference, means any person who at the date of the payment is entitled if bankruptcy supervenes to prove in the bankruptcy and share in the distribution of the bankrupt's estate; and accordingly a payment to or for the benefit of a surety before he has been called upon to pay as surety may be a fraudulent preference (see also *Re Blackpool Motor Car Co.*, [1901] 2 Ch. 77, notwithstanding *Re Warren*, [1900] 2 Q. B. 138). The decision therefore assumes that a surety has a right under sec. 37 of the Act to prove in respect of his contingent liability. In *Ex parte Delmar, In re Herepath and Delmar*, 1890, 38 W. R. 752, the actual question was raised whether a person in the position of surety for the bankrupt could prove against the bankrupt's estate before he had been called upon to pay the money for which he was thus liable, and the Court disposed of the case by merely declaring that the surety was entitled to prove for something, and left it to be determined for what amount the proof should stand, merely deciding that the liability of the bankrupt principal was a proveable liability in respect of which proof of some kind could be tendered. But it has been held under rule 9 of Sched. 1 to the Bankruptcy Act, 1883, which provides that a creditor shall not vote at the first meeting of creditors "in respect of any unliquidated or contingent debt, or any debt, the value of which is not ascertained," that a surety for a bankrupt is not entitled to proof for the purpose of voting at such meeting unless he has actually paid the debt for which he is surety (*Ex parte Whittaker, In re Parrett*, 1891, 39 W. R. 400). [On a guarantee for interest, "to pay interest so long as any principal remains due," the liability of the principal for the principal sum ceases on his bankruptcy, and therefore the surety has no right of proof (*Re Moss*, [1905] 2 K. B. 307).]

RIGHTS OF SURETY ON DEATH OF PRINCIPAL.—A surety who paid off the debt of his deceased principal, even though after death, might in the same way as a creditor bring an action for *administration* of the principal's estate (*Williams v. Jukes*, 1864, 34 L. J. P. & M. 60; *Williams on Executors*, 10th ed., p. 353). And it may be added, that by virtue of the provisions of the Mercantile Law Amendment Act already referred to, a surety to the Crown being entitled "to stand in the place of the creditor and to use all his remedies," is entitled to the Crown's priority in the administration of his principal estate (*In re Lord Churchill, Manisty v. Churchill*, 1888, 39 Ch. D. 174). [The obligation of the surety to answer for the integrity of a person will not determine by the surety's death unless it is so stipulated (*Re Crace*, [1902] 1 Ch. 733).]

RETAINER OF EXECUTOR-SURETY.—An executor who is a surety for the debt of his testator has a right of retainer against his assets (*Re Giles*, [1896] 1 Ch. 956); and in an administration action he does not lose his right of retainer by delay merely, if such delay can be explained, or by paying the assets into Court or to a receiver, so long as there are assets against which he can exercise the right. See **EXECUTORS AND ADMINISTRATORS**, Vol. V. p. 571.

SURETY OF MORTGAGOR.—The relationship of principal and surety, where the two join in a mortgage, requires special notice. The circumstances under which a surety will be discharged have been fully dealt with under GUARANTEE (see Vol. VI., at pp. 441 *et seq.*). [A surety is a necessary party to an action for foreclosure where he has paid the debt or any part of it (*Gedye v. Matson*, 1858, 25 Beav. 310; 53 E. R. 655).] The necessity for precaution by a mortgagee who wishes to reserve his rights against the mortgagor's surety is illustrated by the following two decisions:—In *Bolton v. Buckenham*, [1891] 1 Q. B. 278, the mortgagor and a third party as his surety covenanted to pay the principal on a given date. By a subsequent deed this mortgage and various others were consolidated, the mortgagee taking an assignment of the mortgage debt and mortgaged premises expressly with the full benefit of the covenants contained in the several mortgage deeds, and the mortgagor covenanting to pay the full sum on a new date. The surety was not a party to the consolidating deed, and it was held that the covenant in the second deed necessarily implied that the mortgagor could not be sued in respect of the first mortgage till the time fixed for payment in the consolidating deed, and accordingly there had been a giving of time to the principal debtor, whereby the surety was discharged from liability; the new covenant for payment being held to be inconsistent with the old. And in *Bolton v. Salmon*, [1891] 2 Ch. 48, it was held further under similar circumstances, that the surety is not only discharged from personal liability, but also any property which the surety charges as security is likewise released. It is prudent, therefore, in mortgages of this class to insert a proviso that the surety shall be liable as a principal debtor, and also to make him and the debtor enter into the covenants jointly and severally with the mortgagee. And as between the mortgagor and his surety the true relationship may be made to continue by providing that as between themselves the principal debtor shall be primarily liable. See, for examples, Key and Elphinstone, 5th ed., vol. ii. p. 113.

[For authorities on the subject of principal and surety, see references at the end of article GUARANTEE; and in connection with mortgages, see Coote's *Law of Mortgages*, vol. i. ch. ix., "Of Suretyship."]

Principal Challenge.—See JURY.

Principal Engineer.—See ENGINEER, Vol. V. p. 277.

Principal Mansion-House.—The expression *capitale messuagium*, principal mansion-house, means the lord's chief dwelling-place within his fee. "Mansum capitale dicitur de ædibus domini manerii, quas aular vulgo nuncupant" (see also Bracton, ii. c. 16; Fleta, lib. vi. c. 51, where a distinction is made between *mansio*, villa, and *manerium* or *aulam*).

A principal mansion-house in the sense of a *capitale messuagium* was no doubt identical with a manor-house (see articles MANOR; MANOR-HOUSE).

The expression has, however, acquired a new meaning under the Settled Land Acts. The Settled Land Act, 1890, s. 10, repealing sec. 15 of the Settled Land Act, 1882, provides—

(1) From and after the passing of this Act, sec. 15 of the Act of 1882, relating to the sale or leasing of the principal mansion-house, shall be and the same is hereby repealed;

(2) Notwithstanding anything contained in the Act of 1882, the principal mansion-house (if any) on any settled land, and the pleasure-grounds and park and lands (if any) usually occupied therewith shall not be sold, exchanged or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court;

(3) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure-grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion-house within the meaning of this section.

The cases on this section will be found collected in the article MANSION-HOUSE, where the question whether or not there can be two principal mansion-houses on one settled estate is also discussed.

See further, articles MANOR; MANOR-HOUSE; MANSION-HOUSE.

Principal Money.—The term “money” by itself will usually be construed to mean money proper, that is, cash actually in hand (*Williams v. Williams*, 1877, 8 Ch. D. 789), but “principal money” means all a person’s capital, that is, all his money’s worth (*Prichard v. Prichard*, 1870, L. R. 11 Eq. 232). See also WILL, *Judicial Glossary*. See also PRINCIPAL SUM, with which the phrase “principal money” is often used as synonymous (cp. *Real and Personal Advance Co. v. Clears*, 1888, 20 Q. B. D. 304; *Bianchi v. Offord*, 1886, 17 Q. B. D. 484).

Principal Sum.—A sum of money is usually styled principal in contradistinction to collateral sums connected therewith, such as interest, charges, etc. So under the form in the Bills of Sale Act Amendment Act, 1882, 45 & 46 Vict. c. 43, s. 9, a fixed sum must be stated as the amount secured which, with interest calculated up to the time when the principal shall be called in, can be recovered by the grantee. And by sec. 7 (1) default in payment of the principal sum warrants seizure under the bill of sale. The above provision is so stringent that a bill of sale cannot be made to cover further advances of an uncertain amount (*Cook v. Taylor*, 1887, 3 T. L. R. 800), or by way of indemnity where the amount ultimately to fall due is uncertain (*Hughes v. Little*, 1886, 18 Q. B. D. 32). And it has been held that there must be no attempt to alter the sum secured, and that nothing must be added to it except by way of rateable interest (*Davis v. Burton*, 1883, 11 Q. B. D. 537).

In other cases, however, principal sum may not be a fixed sum. Thus, if a covenant or indemnity is given by way of collateral security for principal and interest secured by mortgage, and said covenant or indemnity contains a stipulation that no greater principal sum shall be ultimately recoverable under it than a sum named, the phrase “principal sum” there does not mean “no greater sum in respect of the principal secured by the mortgage,” but the amount to be recovered under the covenant or indemnity (*Miller v. Miller*, 1886, filed in H. L. Sess.). Where an annuity was bequeathed and an investment in the funds directed to secure it, and power was given to the legatee to appoint the annuity so bequeathed, it was held that the power extended to the principal sum invested, there being evidence that such was the testator’s intention (*Samuda v. Lousada*, 1843, 7 Beav. 243; 49 E. R. 1058).

Printed Cases.—See APPEALS, Vol. I. at p. 411; PRINTING.

Printers.—The following statutory provisions are applicable to printers:—

Any person who shall print any paper for hire, reward, gain, or profit must carefully preserve and keep one copy (at least) of every paper so printed by him, on which he shall write or cause to be written or printed in fair and legible characters, the name and place of abode of the person by whom he is employed, under penalty for neglecting to do so, or refusing to produce the paper to any Justice of the Peace who shall require to see it, of £20 (39 Geo. III. c. 79, s. 29; 32 & 33 Vict. c. 24, Sched. 4).

Penalties not exceeding £20 may be recovered in a summary way (s. 35).

Proceedings under this Act shall not be commenced unless in the name of the law officers of the Crown (9 & 10 Vict. c. 33, s. 1). Every printer must print in legible characters his name and address in the first and last leaf of every book or paper intended to be published, under penalty of not more than £5 for every copy (2 & 3 Vict. c. 12, s. 2), except in the case of books or papers printed at the University Press of Oxford, or the Pitt Press of Cambridge, where the printer, instead of his name, must print the following words:—"Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be (s. 3). Actions for penalties must be commenced in the name of the Attorney- or Solicitor-General of England, or the Queen's Advocate in Scotland (s. 4).

Nothing in these Acts extends to any papers printed by the authority and for the use of either House of Parliament (39 Geo. III. c. 79, s. 28), or to the impression of any engraving, printing by letterpress of the name, or name and address or business or profession of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise (s. 31); nor is the name and address of the printer required to be printed on bank notes, bills, etc., nor upon any proceeding in law or equity, nor on any paper printed by authority of any public board or public office (51 Geo. III. c. 65, s. 3). The Acts extend to pamphlets.

As to necessity for printer's name and address to appear on every bill, placard, or poster having reference to an election, see *ILLEGAL PRACTICES*, Vol. VII. p. 10.

Printing is a trade which must be carried on with prudence and caution; for if anything libellous be printed it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous (*per* Lord Hardwicke in *Printer of the Champion v. Printer of the St. James's Evening Post*, 1742, 2 Atk. 469; 26 E. R. 683).

In an action brought against the editor and printer of *Fraser's Magazine*, both were held liable for a libellous lithographic print, which, though not struck off by the printer, was referred to in the letterpress of one of the articles (*Watts v. Fraser and Moyes*, 1835, 7 Car. & P. 369). And a printer whose name appears as publisher on the imprint of a newspaper, although only a foreman printer engaged at a weekly salary, and having no means of knowing the contents of the paper, may be committed for contempt of Court for publishing therein statements relating to matters in dispute in an action

pending (*American Exchange in Europe v. Gillis and Others*, 1889, 5 T. L. R. 721).

With regard to printer's lien, a printer who is employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers (*Blake v. Nicholson*, 1814, 3 M. & S. 167; 15 R. R. 455).

But in the case of a stereotype printer, who claims a lien on stereotype plates not manufactured by him, it is necessary to show a course of dealing so general and uniform that persons must be supposed to form their contracts tacitly on the understanding of such a usage (*Bleaden v. Hancock*, 1829, 4 Car. & P. 152; 34 R. R. 775).

By general usage a printer is not entitled to be paid for any part of his work until the whole is completed and delivered. This custom controls the general law that a workman is entitled to be paid for his labour where the work is destroyed, without any fault of his own, before it is completed or delivered to the employer (*Gillet v. Mawman*, 1808, 1 Taun. 137).

It is not the custom of the London trade for the printer to insure the publisher's price (2 Taun. 325; Comyns, *Digest*, "Printer").

[*Authorities*.—Shortt's *Copyright and Libel*, 2nd ed.; Fisher and Strahan's *Law of the Press*, 2nd ed., 1898.]

Printing.—The following documents are required to be printed:—

Affidavits for use on a trial on affidavits must be printed (Order 38, r. 30), unless they have been previously used upon any proceeding without having been printed (Order 66, r. 7).

Affidavits in answer to interrogatories, if they exceed ten folios, unless otherwise ordered (Order 31, r. 9). Where the schedule to such an affidavit was of great length the Court allowed it to be filed written, to save expense (*Webb v. Bornford*, 1880, 49 L. J. Ch. 288).

Special cases, whether originating proceedings or not (Order 34, r. 3); pleadings, if they exceed ten folios (Order 19, r. 9); petitions of right (following the practice prior to the Judicature Acts); depositions of witnesses (Order 66, r. 5); must be printed.

When an indorsement or pleading is amended by adding in any one place more than 144 words, or where the amendments are so numerous or complicated as to render the amended document difficult or inconvenient to read, the document must be reprinted (Order 28, r. 8).

See also APPEALS, Vol. I. pp. 410, 411.

Print Works.—See FACTORIES AND WORKSHOPS, Vol. V. at pp. 675, 683, 684.

Prior Charges; Incumbrancers.—See PRIORITIES; MORTGAGE.

Prior Invention; Publication; User.—See DESIGNS; PATENTS.

Priorities.—[This article relates only to priorities in respect to dealings with land. The subject of it, so far as notice is concerned, has been also dealt with in the article NOTICE (EQUITABLE DOCTRINE OF). As to priorities in respect of personalty, see ASSIGNMENT OF CHOSSES IN

ACTION, Vol. I. p. 555; EQUITABLE ASSIGNMENT, Vol. V. p. 309; MORTGAGE, *Notice*, Vol. IX. p. 356.] The two great maxims of equity with reference to the doctrine of priorities are—(1) “Where equities are equal the law prevails;” and (2) “*Qui prior est tempore potior est jure*.” The second of these is often misunderstood, but the mistake is the more easily obviated by remembering that it must be taken in connection with and as subservient to the first. Accordingly, it means nothing more than that in a case of conflicting equities, all other the respective rights of the parties being equal, he who is first in point of time is entitled to be preferred by the Court—and the principle applies only as between parties having no other than equitable interests, and even then is the last test resorted to. The first maxim, on the other hand, has a far more extensive application, and is the basis of the doctrines concerning the protection afforded by the possession, and also the right to call for the possession, of the legal estate. The chief instance of this is the protection of a purchaser for value *bonâ fide* and without notice getting in the legal estate at the time of the purchase against any equitable claim of another party. And a purchaser for value and without notice, even if he subsequently acquire the legal estate, and though, during the interval between payment and getting in the legal estate, he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself, is nevertheless protected against other claims. To this rule there is the well-known exception, “that you cannot make use of the doctrine of *tubula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim” (*per* Jessel, M.R., in *Harpham v. Shacklock*, 1882, 19 Ch. D. 207, quoted in *Taylor v. Russell*, [1891] 1 Ch. 8 (*q.v.*); [1892] A. C. 244). The notice in this case is constructive notice, for where there is a term in gross the expressed object of which has been satisfied, the term is, according to the doctrine of equity, held on trust for the successive equitable interests according to their priorities. Consequently, the subsequent equitable owner who gets in the legal estate gets it subject to the equity of the prior equitable owner, and may not set up the legal estate against such owner.

The law as to the relative force of the two maxims has been stated in *Bailey v. Barnes*, [1894] 1 Ch. 25, by the Court of Appeal: “The maxim *Qui prior est tempore potior est jure* . . . is in our law subject to an important qualification, that where equities are equal, the legal title prevails. Equality, here, does not mean to refer to priority in point of time, as is shown by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better situation than he who has equity only. The reasoning is technical and not satisfactory; but as long ago as 1728 the law was judicially declared to be well settled, and only alterable by Act of Parliament” (see *Brace v. Duchess of Marlborough*, 1728, 2 P. Wms. 491; 24 E. R. 829).

The doctrine, as above stated, applies not only to cases of tacking, but to every case where an equitable owner or incumbrancer for value without notice of prior equitable interests gets in the legal estate from one who, in parting with the legal estate, commits no breach of trust.

The cases in which the acquisition of the legal estate will give a subsequent innocent equitable mortgagee priority over a prior mortgagee have been considered by the House of Lords in *Taylor v. Russell*, [1892] A. C. 244. In that case the mortgagor mortgaged the estate in question twice over. At the time he so mortgaged he had not the legal estate, though it was believed he had; it was in fact outstanding in a mortgagee. The mortgagor in so mortgaging twice had forged a deed thereby representing to the first of his mortgagees that he had the legal estate, to the second of his mortgagees he showed his true title omitting the outstanding overriding mortgage. On the forgery being discovered, the mortgagee who had taken under the forged title had the legal estate conveyed to him by the overriding mortgagee, and the Court held that there was nothing to show that the mortgagee who had taken under the forged title had acted inequitably in getting in the legal estate, and that there was no equity which prevented him from availing himself of its protection, and that he was entitled to priority over the mortgagee who had taken under the true title.

Having dealt with the relative force of the two primary rules embodied in these maxims as to priorities, we have still to consider the effect of the maxims separately. The law on the subject is inseparable from the law of mortgages and notice, and the reader should refer to MORTGAGE, NOTICE, and LEGAL ESTATE for more general information. We propose here to discuss only certain well-established principles laid down in the more recent cases for determining what circumstances are sufficient for depriving the party of the right of priority that the maxims respectively confer—*i.e.* *Firstly*, what circumstances as between an owner of the legal estate and an equitable incumbrancer will deprive the former of his right of priority. *Secondly*, as between equitable incumbrancers and where the maxim *Qui prior est tempore potior est jure* would apply, what circumstances will nevertheless postpone the rights of a person who is prior in time.

And, *firstly*, as to the legal being postponed to the equitable owner. The case of *Northern Counties of England Fire Insurance Co. v. Whipp*, 1884, 26 Ch. D. 482, wherein Fry, L.J., delivered the joint judgment of the Court of Appeal, may well be considered the leading case on this question. From the authorities therein reviewed the following rules are deduced:—

I. The Court will postpone the prior legal estate to a subsequent equitable owner only in the case of fraud or negligence so gross as to amount to fraud. These are classed as cases—“(a) Where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate; of which assistance or connivance the omission to use ordinary care in inquiry after or keeping title-deeds may be, and in some cases has been, held to be sufficient evidence where such conduct cannot otherwise be explained.

“(b) Where the owner of the legal estate has constituted the mortgagor his agent, with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.”

II. Mere carelessness or want of prudence on the part of the owner of the legal estate is not a ground for postponing him to the subsequent equitable estate.

The cases as to omission to use ordinary care in *inquiry* after title-

deeds are [treated of under NOTICE (EQUITABLE DOCTRINE OF), Vol. X. p. 35].

As to Negligence in Keeping the Title-Deeds.—Where the deeds are lent by the mortgagee upon a reasonable representation, he retains his priority (*Martinez v. Cooper*, 1826, 2 Russ. 198; 38 E. R. 309; 26 R. R. 49); but where he returns them with the express purpose of money being raised, the same principle applies as in the case where they are originally left in the mortgagor's hands (*Briggs v. Jones*, 1870, L. R. 10 Eq. 92); and this is the case even though the mortgagee directly and expressly told the mortgagor to disclose to any subsequent incumbrancer the existence of his mortgage, the reason being that the legal owner puts it in the mortgagor's power to raise any money he pleases. "To hold that a person who advances money on an estate the title-deeds of which are under such circumstances left in the hands of the mortgagor is not to have preference, would be to shut our eyes to the plainest equity" (*per* Lord Cranworth, L.C., in *Perry-Herrick v. Attwood*, 1858, 2 De G. & J. 21; 44 E. R. 895; *Briggs v. Jones*, *ubi supra*). [Further, where the *indicia* of title are intrusted to a person with an intention that he should deal with them, the case falls to be decided in accordance with the principles governing the cases of authority given to an agent by his principal, and the principal is under a duty to the persons dealing with the agent to give them notice of the limit to the authority or he will be bound by what the agent does (*Rimmer v. Webster*, [1902] 2 Ch. 163, which was a case of a mortgage bond issued by town commissioners).] On the other hand, where the misconduct of the mortgagor is the sole cause of the mortgagee's parting with the deeds, the latter does not lose his priority, *e.g.* where a mortgagor, under pretence of obtaining money to pay off mortgages, obtained the deeds from one of the mortgagee's executors, who was tenant for life under the mortgagee's will, and subsequently sent back a parcel purporting to contain the deeds, but which, as was discovered on the death of the tenant for life, did not contain certain title-deeds, these having been deposited by the mortgagor with a bank, it was held that the surviving executor, who was also a reversioner, was entitled to priority over the bank and delivery of the title-deeds (*In re Ingham*, *Jones v. Ingham*, [1893] 1 Ch. 352).

We will now consider the second branch of the subject, namely, as between equitable incumbrancers merely, and where the maxim *Qui prior est tempore potior est jure* applies, what circumstances will nevertheless postpone the rights of him who is prior in time.

It has been stated that between two persons whose equitable interests are identical in nature and quality, and there is the difference of time only, possession of the deeds will override the priority of time (*cp. Rice v. Rice*, 1853, 2 Drew. 73, 81; 61 E. R. 646; *Lloyds Banking Co. v. Jones*, 1885, 29 Ch. D. 221, at p. 229). But there must be some default on the part of the person having priority of time whereby the deeds fail to be in his possession in order so to postpone him, although the amount of negligence in the case of conflicting equities need not be of the nature that is required to postpone the owner of a legal estate (*Taylor v. Russell*, [1892] A. C. 244). In the case of *In re Richards*, 1890, 45 Ch. D. 589, it was held that where a client's solicitor represented to him that he had invested money for him on mortgage, whereas the mortgage was as a fact in the solicitor's own name, and the solicitor subsequently deposited the deeds with his bankers as security

for an advance, this was not sufficient negligence to deprive the client of a prior equity, the solicitor being a trustee of the mortgage for the client. Cp. *Carrit v. Real and Personal Advance Co.*, 1889, 42 Ch. D. 263, quoted in that case, where it was held that a solicitor who took a mortgage in the name of his clerk, and left the deeds in the latter's possession, was not postponed to persons taking a title from the clerk—a much stronger case.

[Where the relation between the equitable incumbrancer and the person in possession of the title-deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (*e.g.* that of trustee and *cestui-que trust*, or solicitor and client) the equitable incumbrancer is not (where he is *bonâ fide*) to be deprived of his priority by reason of the improper acts of the person entrusted with the deeds (*Taylor v. London and County Bank*, [1901] 2 Ch. 231, Stirling, L.J., p. 261). But where a person in such a fiduciary position has not obtained all the title-deeds although he ought to have done so, and the person in whom the legal estate is vested having the conveyance thereof in his possession conveys to a *bonâ-fide* purchaser for value without notice, he will gain priority (*Lloyds Bank v. Jones, ubi supra*; *Walker v. Linom*, [1907] 2 Ch. 104).]

But where an equitable incumbrancer leaves title-deeds so as to enable money to be raised thereon, he loses his priority quite apart from any question of fraud or negligence, but on the principles above stated in the case of similar conduct by an owner of the legal estate. Accordingly, if the debenture holders of a company leave the title-deeds of some of its property with the company, so as to enable it to deal with its property as if it had not been incumbered, and the company deposits the title-deeds with an equitable mortgage, they cannot set up their prior charge against the equitable mortgage (*In re Castell & Brown*, [1898] 1 Ch. 315). In this case the debenture was to be a floating security, but so that the company should not create any charge on its realty or leaseholds in priority to the debentures; and when the equitable mortgage, which was to the company's bankers, was made, the bank had no notice of the existence of the debentures, and made no inquiries, and it was none the less held that the bank was entitled to priority over the debenture holders [(*Re Valletort Sanitary Steam Laundry*, [1903] 2 Ch. 654). The same principle is applicable to the case of a surviving partner depositing the deeds with bankers for an overdraft; the bankers rank before the lien of the deceased partner for his share of the partnership assets (*Re Bourne*, [1906] 1 Ch. 113)].

All allusion to tacking and notice has purposely been omitted, this part of the subject being fully dealt with under TACKING and the articles to which reference has already been made.

Prior; Priory.—Priories, of which there were many in England before the Reformation, were societies of monks or nuns, the chief of whom was termed prior or prioress. A priory might be either independent, or a cell dependent on some abbey. The name of prior was also given to the officer of an abbey ranking next after the abbot; and in abbeys attached to cathedrals the prior was practically the head of the community, as the bishop was the abbot (see ABBEY).

Prisage.—(1) The ancient right of the Crown to take toll of wines imported into England. Originally it was exercised by the purchase, below its value, of as much as the King required, but in

course of time it took the form of a toll of one tun out of every cargo of from ten to twenty tuns, and of two tuns out of every cargo above twenty tuns, commuted by Edward I., in the case of alien importers, for a duty of 2s. per tun. When thus commuted it was called "butlerage," from being paid to the King's butler, and it was levied in addition to tonnage (*q.v.*). The duty seems to have been granted by Charles II. to the Duke of Grafton, and 43 Geo. III. c. 156, 1803, reciting that the then duke claimed it at all ports in England, with the exception of those in the Duchies of Cornwall and Lancaster, Liverpool and Plymouth; the King, as Duke of Lancaster, at Liverpool and the Lancaster ports; the Prince of Wales, as Duke of Cornwall, at the Cornish ports and Plymouth; the Duke of Beaufort, at Swansea and Chepstowe; and Lord Bute at Cardiff; empowered the Treasury to arrange with their possessors for the purchase of these rights. An agreement so made with the Duke of Grafton was confirmed by 46 Geo. III. c. 79, and 49 Geo. III. c. 98, ss. 35, 36, 1809, enacted that wine should not thenceforward be admitted to prisage in any ports where the right had been purchased, and that butlerage and composition money for it should cease. A similar agreement with the Duchy of Lancaster was confirmed by 2 & 3 Will. IV. c. 84, s. 40, 1832, and one with Lord Ormonde for the purchase of the right of prisage and butlerage in Ireland by 50 Geo. III. c. 101, 1810, the duties being abolished in Ireland by 51 Geo. III. c. 51, 1811. For the present duties on wine, see CUSTOMS.

(2) The Sovereign's or Lord High Admiral's share in a vessel lawfully captured at sea. It is said that this is the meaning of "prisage" in 31 Eliz. c. 5, s. 4, 1589; see the Black-Book of the Admiralty (Rolls Series), vol. i. pp. 151, 173, 399.

[*Authorities* (for (1)).—Madox, *History and Antiquities of the Exchequer*, 1769; Dowell, *History of Taxation in England*, 1884; Hall, *History of the Customs Revenue of England*, 1892.]

Prison.—In the earliest days of English law gaols were not used. The offenders were either executed or put into private custody. See BAIL; MAINPRISE. In the reign of Henry II. the Assizes of Clarendon and Northampton made provision for the establishment of a gaol in every county, where the sheriff could put his prisoners; and directed that they should be placed in the King's castles or in great towers. Private prisons, however, existed for manorial jurisdictions and other liberties and franchises, into which the King's sheriff could not enter, and were filled by the bailiffs of franchise. But in theory they were the King's prisons in the keeping of subjects (2 Co. *Inst.*, 100, 705).

In consequence of abuses by constables of royal castles it was enacted in 1402 (5 Hen. IV. c. 10) that justices of the peace should imprison only in the common gaol for their jurisdiction. This Act did not, however, affect franchise prisons, *i.e.* those of manors or boroughs and liberties, or of ecclesiastical dignitaries; but from this date the "common gaol" has continued to be an integral part of the law of England. Imprisonment in gaol for safe custody lasted only till the next sessions of the peace or of a Court of gaol delivery, according to the commitment. But it had long been the practice, and by some judges is held still to be the duty, of a Court of gaol delivery to deliver the gaol of all persons held there for trial whether at assizes or Quarter Sessions; and subject to the Assizes Relief Act, 1889, it is the duty of the gaoler to supply

to the Assize Court a calendar of all prisoners in his custody awaiting trial. See CALENDAR OF PRISONERS.

The old gaol was a place of imprisonment only, and no labour could be exacted from prisoners till the creation of Houses of CORRECTION. The legislation of the seventeenth and eighteenth centuries provided for the building of better gaols and houses of correction, as a county charge, and for the supervision and management of the gaols (see Burn, *Justice*, 17th ed., 1793, tit. "Gaol").

During the nineteenth century a complete change in the system of control and management of local prisons was effected. The result has been to create three classes of prisons—

1. Convict prisons for prisoners sentenced to PENAL SERVITUDE (*q.v.*).
2. Local prisons for other prisoners except inebriates.
3. State inebriate reformatories for certain classes of inebriates.

The Prison Act, 1865, enacted a complete code for the regulation of all local prisons, *i.e.* prisons in counties, boroughs, or franchises, maintained and controlled by local authorities. The law as to gaols as it stood after the passing of this Act is fully dealt with in Burn, *Justice*, 30th ed., tit. "Gaol." Houses of correction were then abolished. See CORRECTION, HOUSE OF. In 1877 (40 & 41 Vict. c. 21) all prisons in England other than convict prisons (see PENAL SERVITUDE) were transferred from the local authority to the Crown. Gaols had always been described as those of the King when used for offenders against his peace. In 1877 (40 & 41 Vict. c. 21) central administration took the place of local; and the only local supervision is that of the visiting justices selected by the justices for the districts for which the prison is used. See St. R. & O., Rev. (1904 ed.), vol. x., tit. "Prison," E.

Many local prisons have been discontinued by Home Office Order. For list to end of 1906, see Index to St. R. & O. (1907 ed.), p. 563.

The orders in force appointing particular prisons for use as the common gaol of one or more counties are collected in St. R. & O. (1904 ed.), vol. x., tit. "Prison," E, pp. 1, 65-68. A subsequent rule (St. R. & O., 1906, No. 525) appropriates Borstal Prison and part of Lincoln Prison for selected juvenile adult male criminals. See Prison Commissioners' Report, Parl. Papers, 1907, C.

The orders made up to 1904 under the Prison Act, 1898, regulating the discipline and dietary of prisoners in local prisons (1) under sentence for crime, (2) civil, (3) untried, are collected in the Statutory Rules and Orders, Revised, 1904 ed., tit. "Prison," E. They were amended in 1906 (St. R. & O., 1906, No. 525) and 1907 (St. R. & O., 1907, No. 617).

Each local prison is inspected by visiting justices appointed by the Quarter Sessions of the counties or boroughs for which it is used, subject to rules made by the Secretary of State (St. R. & O., 1898, No. 533*a*; 1901, No. 601).

Detention in prison, to be legal, must be in the manner and for the term authorised by the warrant of committal or sentence of the Court. A sentence of imprisonment, unless otherwise ordered, runs from the first day of the assizes at which the conviction takes place (*King v. R.*, 1845, 7 Q. B. 782); but at Quarter Sessions from the day on which it is pronounced, unless otherwise ordered (21 & 22 Vict. c. 73, s. 12). Month as a sentence means calendar month (61 & 62 Vict. c. 41, s. 12), unless the contrary is expressed. Where the sentence expires on Sunday, Christmas Day, or Good Friday, the prisoner is released on the day next preceding (61 & 62 Vict. c. 41, s. 12 (2)).

Committals for trial or under sentence are to the prisons appointed as above. Prisoners committed for trial may not be removed from the prison to which they are committed except (1) by writ of *habeas corpus*; (2) by judge's order when they are in the gaol which is being delivered under the commission of gaol delivery under which the judge is acting (30 & 31 Vict. c. 35, s. 10); or (3) by order of a Secretary of State (61 & 62 Vict. c. 41, s. 11). This also extends to prisoners under sentence.

Prisoners may also be let out to give evidence by warrant of a judge of the High Court (16 & 17 Vict. c. 30, s. 9).

Inquests must be held on all prisoners who die in prison (3 Co. *Inst.*, 52). See CORONER, Vol. III. p. 673.

As to naval prisons, see NAVY. Naval prisons are appointed and regulated by the Admiralty under the Naval Discipline Act, 1866, 29 & 30 Vict. c. 109. The declarations fixing the prisons up to 1906 are printed in Statutory Rules and Orders, Revised, 1904 ed., vol. ix., tit. "Navy," p. 9.

As to military prisons, see MILITARY CUSTODY, and St. R. & O., Rev., 1904 ed., vol. i., tit. "Army," p. 133.

"Criminal prisoners," *i.e.* persons charged with or convicted of crime (28 & 29 Vict. c. 126, s. 4), include for purposes of prison treatment (subject to the special provisions of the Prison Rules, 1898) persons committed for criminal contempt of Court (*Osborne v. Milman*, 1887, 18 Q. B. D. 471). Persons committed in default of distress for non-payment of a fine under the Vaccination Acts are dealt with as offenders in the First Division (61 & 62 Vict. c. 49, s. 5; and see *Kennard v. Simmons*, 1887, 15 Cox C. C. 397).

The Prison Rules, 1898, rr. 185-212, 258-274, deal with prisoners awaiting trial for criminal offences.

Imprisoned debtors are dealt with under the Prison Rules, 1898, rr. 244-257. Prisoners convicted on indictment who are appealing against their conviction or sentence, are dealt with under rules made by the Secretary of State on February 24, 1908.

Prison Breach; Breaking.—Escape from prison or breach of prison was at common law treated as a confession of guilt (Bracton, *De Coronâ*, f. 124; 1 Hale, P. C. 607; 1 Seld. Soc. Publ. p. 100, pl. 154, 155, p. 134, pl. 201). In 1295 (23 Edw. I.) it was enacted that no one should have judgment of life and member for breaking prison only, except the cause for which he was taken and imprisoned did require such judgment if he had been convicted thereof. This enactment appears to be the authority for the doctrine that where the accused is detained for felony, the breaking out is to be felony; where for misdemeanor, it is a misdemeanor. To constitute this offence, there must be some actual breaking of the prison (*R. v. Haswell*, 1821, Russ. & R. 458); going out by an open door was the misdemeanor of escape. To the common-law punishment for mere escape from lawful custody on a criminal charge, hard labour can now be added (14 & 15 Vict. c. 100, s. 29). The common law was concerned rather with prisoners in custody for trial than with those imprisoned in execution of sentence; but it covered every legal place of confinement (2 Co. *Inst.*, 587).

There are also statutory provisions dealing with escape or breaking out of prison by persons held in execution.

1. Under the Vagrancy Act, 1824, 5 Geo. IV. c. 83, s. 5, persons who

escape out of any place in which they are legally confined under the Act before the expiration of the term of imprisonment are dealt with as incorrigible rogues.

2. Persons under sentence of transportation or penal servitude found at large without licence during its currency are guilty of felony (5 Geo. iv. c. 84, s. 22; 4 & 5 Will. iv. c. 67; 16 & 17 Vict. c. 99, ss. 7, 8; 20 & 21 Vict. c. 3, ss. 2, 3, 6); and if they are found in a British possession outside the United Kingdom they can be dealt with under the Fugitive Offenders Act, 1881.

3. Breaking out of Parkhurst Prison is specially punished (1 & 2 Vict. c. 82, ss. 12-14) by an addition to the term of imprisonment for a first escape, or as felony on a second escape.

The assistance of prisoners to escape from prison is dealt with under RESCUE; and see ESCAPE.

[*Authorities.*—Hawk. *P. C.*, bk. ii.; Russell on *Crimes*, 6th ed.; Steph. *Dig. Cr. Law*, 6th ed., art. 170; Archb. *Cr. Pl.*, 23rd ed.; Roscoe, *Cr. Ev.*, 13th ed.].

Prisoner of War.—See WAR.

Private Arrangements.—See CREDITORS' DEEDS; FAMILY ARRANGEMENT.

Private Bill Legislation.

[NOTE.—*In this Article, Standing Orders of the House of Lords are cited as L. S. O., and those of the House of Commons as C. S. O.; and where an Order of the one House is practically identical with an Order of the other House of the same number, it is cited as S. O. simply.*]

Definition and Classification of Private Bills.—A private bill is a bill for the particular interest or benefit of any person or persons, as distinguished from a measure of general public policy intended for the benefit of the community at large. Bills which only concern a particular city or borough, or other district or locality, must generally be introduced as private bills, as well as those for the interest or benefit of a particular corporation or company, such as railway and canal bills, and those for the interest or benefit of particular individuals, such as estate and divorce bills. Bills affecting the whole metropolitan area have, however, frequently been introduced and treated as public bills, on account of the magnitude of the area, and the extent of the interests involved.

In dealing with private bills, Parliament exercises judicial as well as legislative functions. The proceedings at certain stages closely follow those of a Court of law, the promoters and opponents of the measure being permitted to appear by counsel, and to adduce evidence in support of their respective contentions, and being required to pay fees as in the case of ordinary litigation.

Where it appears after the first reading of a public bill that the bill affects private rights it is examined with respect to compliance with the Standing Orders, as in the case of a private bill; and after the second reading, it is committed to a select committee, which may be empowered to hear suitors, and their counsel and witnesses, for and against the bill, in the same manner as if it had been introduced as a

private bill; and when it has been reported from such committee, it is re-committed to a committee of the whole House, and is subsequently treated as a public bill. Such a bill is called a hybrid bill, and is subject to the payment of the fees payable in respect of private bills. As to London County Council bills, see L. S. O. 69-69*d*; C. S. O. 194-194*e*.

For the purposes of the Standing Orders of the House of Commons, all private bills to which the Standing Orders are applicable, except estate, divorce, naturalisation, and name bills, are divided into the two following classes, according to the subjects to which they respectively relate :—

1st Class :—

Burial-ground, making, maintaining, or altering.
 Charters and corporations, enlarging or altering powers of.
 Church or chapel, building, enlarging, repairing, or maintaining.
 City or town, paving, lighting, watching, cleansing, or improving.
 Company, incorporating, regulating, or giving powers to.
 County rate.
 County or shire hall, court-house.
 Crown, church, or corporation property, or property held in trust for public or charitable purposes.
 Electricity supply.
 Ferry, where no work is to be executed.
 Fishery, making, maintaining, or improving.
 Gaol or house of correction.
 Gas work.
 Improvement charge, unless proposed in connection with a second-class work to be authorised by the bill.
 Land, inclosing, draining, or improving.
 Letters patent.
 Local court, constituting.
 Market or market-place, erecting, improving, repairing, maintaining, or regulating.
 Pilotage.
 Police.
 Poor, maintaining or employing.
 Poor-rate.
 Powers to sue and be sued, conferring.
 Stipendiary magistrate, or any public officer, payment of.
 And continuing or amending an Act passed for any of the purposes included in this or the second class, where no further work than such as was authorised by a former Act is proposed to be made.

2nd Class :—

Making, maintaining, varying, extending, or enlarging any—

Aqueduct.

Archway.

Bridge.

Canal.

Cut.

Dock.

Drainage—where it is not provided in the bill that the cut shall not be more than 11 feet wide at the bottom.

Embankment for reclaiming land from the sea or any tidal river.

Ferry, where any work is to be executed.

Harbour.

Navigation.

Pier.

Port.

Public carriage road.

Railway.

Reservoir.

Sewer.

Street.

Subway.

Tramway—by which term, as used in the orders, is meant a tramway to be laid along a street or road.

Tramroad—by which term, as used in the orders, is meant any tramway other than a tramway to be laid along a street or road.

Tunnel.

Waterwork.

The Standing Orders of the House of Lords classify private bills as “personal bills” and “local bills,” subdividing local bills into two classes practically identical with the two classes into which private bills are divided in the Standing Orders of the House of Commons, as detailed above, bills for confirming a Provisional Order or provisional certificate being referred to as “Provisional Order confirmation bills” (L. O. S. 1). The term “personal bills” in the Standing Orders of the House of Lords includes all estate, divorce, naturalisation, and name bills, and all other private bills not specified in Order 1 as local bills (L. S. O. 149).

The expressions “personal bills” and “local bills” are not used in the Standing Orders of the House of Commons; and estate, divorce, naturalisation, and name bills, all of which must be originated in the Upper House, are not included in either of the classes into which private bills are divided by those orders. Provisions are, however, made with respect to the bills which are described in the Orders of the Upper House as personal bills, by Standing Orders 188*a*-192 and 211 of the House of Commons (see PERSONAL ACT).

All private bills must be intrusted to, and be solicited by, a parliamentary agent, who is responsible to Parliament for the observance of the rules, orders, and practice of Parliament, and for the payment of the fees (see PARLIAMENTARY AGENT).

Steps to be taken before Introduction of Bill.—Before any bill of either of the classes into which private bills are divided by the Standing Orders of the House of Commons, and which, in the Standing Orders of the House of Lords, are styled local bills, is introduced into Parliament, notices have to be given, by advertisement and otherwise, and deposits made, in accordance with the Standing Orders of both Houses; and for the purpose of ascertaining whether the provisions of such Standing Orders have or have not been complied with, officers called Examiners are appointed, whose duties are to examine all petitions for private bills, and to certify by indorsement on each petition whether the Standing Orders have or have not been complied with, and, when they have not been complied with, to report to the House the facts upon which the decision is founded, and any special circumstances connected with the case (C. S. O. 2, 71; L. S. O. 2, 76). The sittings and proceedings of the Examiners are regulated by C. S. O. 69-78, and L. S. O. 70-79 (see *post*).

In all cases where application is intended to be made for leave

to bring in a bill of either of the two classes, notice must be given stating the objects of such intended application, and the time at which copies of the bill will be deposited in the Private Bill Office, and containing the particulars specified in Standing Orders 3-8 of both Houses.

In the months of October and November, or either of them, immediately preceding the application for the bill, such notice must be published in the *London, Edinburgh, or Dublin Gazette*, as the case may be, and also in newspapers circulating in the districts particularly concerned, in accordance with the provisions of S. O. 9; and all of such publications must be made on or before the 27th day of November (S. O. 9). In the case of a bill relating to letters patent, the notice must also be published twice in the official journal of the Patent Office, before the introduction of the bill into Parliament (S. O. 8*a*); and in the case of a bill for laying down a tramway, or constructing an underground railway or subway, when such bill contains powers authorising an alteration or disturbance of the surface of any street or road, notice thereof must also be posted for fourteen consecutive days in every such street or road in such manner as the authority having the control of the street or road directs; and if, after application to such authority, no direction shall be given, then in some conspicuous position in every such street or road, and the notice must state the place or places at which the plans of the tramway or railway will be deposited (S. O. 10).

Where the bill contains powers authorising any lands or houses to be taken compulsorily, or imposes an improvement charge on any lands or houses, application in writing must, on or before the 15th day of December immediately preceding the application for the bill, be made to the owners or reputed owners, lessees or reputed lessees, and occupiers of all such lands and houses, inquiring whether they assent, dissent, or are neuter in respect of such application; and separate lists must be made of the names of such owners, lessees, and occupiers, distinguishing those who have assented, dissented, or are neuter in respect to such application, or who have returned no answer in respect thereto (S. O. 11, 12). And in certain other cases, notices must be served on the owners, lessees, and occupiers of lands, houses, and other properties which are likely to be affected or interfered with in carrying out the objects of the bill (S. O. 13-18). Such notices may be served, and applications made, either by delivering the same personally to the party entitled to such notice or application, or by leaving the same at his usual place of abode, or by forwarding the same by post in a registered letter, addressed to such place of abode (S. O. 19-21).

In cases of bills to authorise the laying down of a tramway, the promoters must obtain the consent of the local authority of the district or districts through which it is proposed to construct such tramway; and where in any district there is a road authority distinct from the local authority, the consent of such road authority must also be obtained if power is sought to break up any road subject to the jurisdiction of such road authority. Provided that where it is proposed to lay down a continuous line of tramway in two or more districts, and any local or road authority in any such districts does not consent, the consents of the authorities having jurisdiction over two-thirds in length of the streets, and roads along which the line of tramway is proposed to be laid, are deemed to be sufficient (S. O. 22).

In cases of bills of the second class, a plan and also a duplicate

thereof, together with a book of reference thereto, and a section and also a duplicate thereof, and in cases of bills of the first class, under the powers of which any lands or houses may be taken or used compulsorily, and in the case of all bills by which any charge is imposed upon any lands or houses, or any lands or houses are rendered liable to have a charge imposed upon them in respect of any improvement, a plan and duplicate thereof, together with a book of reference thereto, must be deposited for public inspection at the office of the Clerk of the Peace for every county in or through which the work is proposed to be made, maintained, varied, extended, or enlarged, or in which such lands or houses are situate, on or before the 30th day of November immediately preceding the application for the bill; and in the case of railway bills, the ordnance map on the scale of one inch to a mile, with the line of railway delineated thereon, so as to show its general course and direction, must be deposited with such plans, sections, and book of reference; and in cases of bills whereby it is proposed to alter or extend the municipal boundary of any city, borough, or urban district, a map and duplicate thereof, showing the present boundaries as well as the boundaries of the proposed extension, must be deposited for public inspection with the town clerk of such city or borough, or clerk of such urban district, and a copy of the map, with the boundaries delineated thereon, must also be deposited at the office of the Board of Agriculture and Fisheries (S. O. 24).

On or before the 30th day of November a copy of such plans, sections, books of reference, and, in the case of a railway bill, also a copy of the ordnance map, with the line of railway delineated thereon, must be deposited in the Private Bill Office and in the office of the Clerk of the Parliaments (S. O. 25); and in the case of a railway, tramway, or canal bill, must also be deposited in the office of the Board of Trade (S. O. 27). In the case of a tramway bill, an ordnance map of the district on a scale of not less than six inches to a mile, with the line of the proposed tramway marked thereon, and a diagram on a scale of not less than two inches to a mile, must also be deposited at the office of the Board of Trade (S. O. 25*a*). And in cases of bills for the supply of electrical energy, an ordnance map on the scale of not less than one inch to the mile, with the proposed area of supply marked thereon, must be deposited at the office of the Board of Trade (S. O. 25*b*). In cases where the work affects tidal lands, a copy of the plans and sections, accompanied by a map of the country over which the works are proposed to extend, must be deposited at the office of the Harbour Department, Board of Trade; and in cases where the work is to be situate on the banks, foreshore, or bed of any river, at the office of the Board of Agriculture and Fisheries, and of the conservators of the river (S. O. 26, 26*a*). A copy of so much of the plans, sections, and book of reference as relates to particular parishes and districts, must also be deposited with the local authorities of such parishes and districts, in accordance with the provisions of Standing Orders 28 and 29. Where power is sought to take any churchyard, burial-ground, or cemetery, or to disturb the bodies interred therein, or to take any common or commonable land, a copy of so much of the plans, sections, and book of reference as relates to the churchyard, burial-ground, or cemetery, or common or commonable land, must be deposited at the Home Office, and also in the case of common or commonable lands, at the office of the Board of Agriculture and Fisheries (S. O. 30).

The form in which the plans and sections required to be deposited

are to be prepared is prescribed in great detail by Standing Orders 40-45a and 47-55. The book of reference must contain the names of the owners or reputed owners, lessees or reputed lessees, and occupiers of all lands and houses which may be taken compulsorily, or upon which any improvement charge is or may be imposed, and must describe such lands and houses respectively (S. O. 46).

Wherever any plans, sections, and books of reference, or parts thereof, are required by the Standing Orders to be deposited, a copy of the notice published in the *Gazette* of the intended application to Parliament must be deposited therewith (S. O. 31).

A printed copy of every local bill proposed to be introduced into either House must be deposited in the office of the Clerk of the Parliaments on or before the 17th day of December (L. S. O. 32).

Every petition for a private bill in the House of Commons headed by a short title descriptive of the undertaking or bill, corresponding with that at the head of the advertisement, with a declaration signed by the agent, and a printed copy of the bill annexed, must be deposited for public inspection in the Private Bill Office on or before the 17th day of December; and printed copies of the bill must also be delivered therewith for the use of any member of the House or agent who may apply for the same (C. S. O. 32). Such declaration must state to which of the two classes of bills such bill in the judgment of the agent belongs; and if the proposed bill gives power to effect any of the following objects:—that is to say—

Power to take any lands or houses compulsorily, or to extend the time granted by any former Act for that purpose:

Power to levy tolls, rates or duties, or to alter any existing tolls, rates, or duties; or to confer, vary, or extinguish any exemption from payment of tolls, rates, or duties, or to confer, vary, or extinguish any other right or privilege:

Power to amalgamate with any other company, or to sell or lease their undertaking, or to purchase or take on lease the undertaking of any other company:

Power to interfere with any Crown, church, or corporation property, or property held in trust for public or charitable purposes:

Power to relinquish any part of a work authorised by a former Act:

Power to divert into any existing or intended cut, canal, reservoir, aqueduct, or navigation, or into any intended variation, extension, or enlargement thereof respectively, any water from any existing cut, canal, reservoir, aqueduct, or navigation, whether directly or derivatively, and whether under any agreement with the proprietors thereof, or otherwise:

Power to make, vary, extend or enlarge any cut, canal, reservoir, aqueduct, or navigation:

Power to make, vary, extend, or enlarge any railway,

the declaration must state which of such powers are given by the bill, and indicate in which clauses of the bill such powers are given, and must further state that the bill does not give power to effect any of such objects, other than those stated in the declaration. If the proposed bill does not give power to effect any of such objects, the declaration must state that it does not do so. And the declaration must also state that the bill does not give any powers other than those included in the notices for the bill (C. S. O. 32).

On or before the 18th day of December, a printed copy of the bill must be deposited at the office of the Treasury, at the Local Government

Board, and at the General Post Office, and also at the offices of certain other public departments and authorities, according to the subject to which the bill relates (S. O. 34-34a).

An estimate of the expense of the undertaking under each bill of the second class must be made and signed by the person making the same (S. O. 56); and, subject to certain exceptions, a deposit of not less than 5 per cent. in the case of a railway or tramway bill, and of not less than 4 per cent. in the case of any other bill, on the amount of such estimate, must before the 15th day of January be deposited with the Paymaster-General; provided that where the work is to be made out of surplus revenue under the control of the promoters, a declaration stating that fact, with particulars, or, where the work is to be made out of money to be raised upon the security of rates, duties, or revenue already belonging to or under the control of the promoters, a declaration stating those facts, with particulars, together with an estimate of the probable amount of such rates, duties, or revenue, may be deposited, and in such cases no money deposit is required (S. O. 57, 58, 59; and see PARLIAMENTARY DEPOSITS). As to the form of the estimate in the case of a railway, tramway, tramroad, canal, dock, or harbour bill, see S. O. 37.

Copies of the estimate of expense, and where a declaration alone, or declaration and estimate of the probable amount of rates are required, copies of such declaration, or of such declaration and estimate, must be printed at the expense of the promoters of the bill, and delivered at the office of the Clerk of the Parliaments for the use of the House of Lords, and at the Vote Office for the use of the members of the House of Commons, and at the Private Bill Office for the use of any agent who may apply for the same (L. S. O. 36; C. S. O. 36); and in the case of a bill for incorporating a joint-stock company, there must also be deposited in the Private Bill Office the documents mentioned in C. S. O. 35a.

All estimates, declarations, and lists of owners, lessees, and occupiers which are required by the Standing Orders must be deposited in the Private Bill Office, or in the office of the Clerk of the Parliaments, as the case may be, on or before the 31st day of December (C. S. O. 35; L. S. O. 35).

Introduction of the Bill into Parliament.—Bills which, in the Standing Orders of the House of Lords, are termed "personal bills" are always originated in the Upper House. They are brought in upon a petition for leave to bring in the bill, with a printed copy of the proposed bill annexed; and such petition must be signed by one or more of the parties principally concerned in the consequences of the bill (L. S. O. 150, 151). The proceedings in relation to personal bills are governed by Standing Orders 150-181 of the House of Lords, and by Standing Orders 188a-192 and 211 of the House of Commons (see PERSONAL ACT).

Bills of either of the two classes into which private bills are divided by the Standing Orders of the House of Commons, and which in the Standing Orders of the House of Lords are called "local bills," may be originated in either House. No such bill may be brought into the House of Commons but upon a petition first presented, which has been duly deposited in the Private Bill Office, and indorsed by one of the Examiners, with a printed copy of the proposed bill annexed; and such petition must be signed by the suitors for the bill, or some of them (C. S. O. 193). And no such bill for which a petition has not been presented in the House of Commons may be brought into the House

of Lords except on petition for leave to bring in the bill, with a printed copy of the proposed bill annexed (L. S. O. 86).

By constitutional usage the House of Commons has the exclusive right to impose taxation, and, generally speaking, bills which impose any pecuniary charge on the people, must originate in that House. It is, however, provided by S. O. 226 of the House of Commons, that the House will not insist on its privileges with regard to any clauses in private bills, or in bills to confirm any provisional orders or provisional certificates, sent down from the House of Lords, which refer to tolls and charges for services performed, and are not in the nature of a tax, or which refer to rates assessed and levied by local authorities for local purposes.

It is usual to commence private bills, other than personal bills, by petition to the House of Commons for leave to bring in the bill; and at the commencement of each session, the Chairman of the Committee of Ways and Means, or the counsel to the Speaker, seeks a conference with the Chairman of Committees of the House of Lords, or with his counsel, for the purpose of determining in which House the respective bills shall be first considered (C. S. O. 79).

The petition must be written, and not printed nor lithographed; must contain a prayer; must be signed or sealed on the skin or sheet on which the prayer is written; and must be addressed "To the Honourable the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled." No erasures or interlineations may be made in the petition.

A list of all petitions for private bills is kept in the Private Bill Office in the order of their deposit, which is called the "General List of Petitions," and all petitions therein are numbered consecutively (C. S. O. 229). Registers are also kept, in which are entered the name and place of residence of the parliamentary agent soliciting the bill, and all the proceedings, from the petition to the passing of the bill; and such registers are open for public inspection (C. S. O. 227).

Proceedings before the Examiners and Standing Orders Committees.—The examination of petitions for private bills commences on the 18th of January, and the promoters of each bill, whether it is opposed or not, must prove compliance with the Standing Orders of both Houses at the time appointed by the Examiners (C. S. O. 69; L. S. O. 70).

Persons desiring to oppose any bill on the ground that the Standing Orders have not been complied with, may do so by depositing in the Private Bill Office a memorial complaining of such non-compliance. The memorial must be addressed to the Examiner of Standing Orders for Private Bills in the House of Lords, and to the Examiner of Petitions for Private Bills in the House of Commons, and must state specifically the matter complained of. Memorials complaining of non-compliance with the Standing Orders in reference to petitions for bills deposited in the Private Bill Office on or before the 17th December must be deposited, if they relate to bills numbered in the general list published by the Private Bill Office, from 1 to 100, before January 9th; if they relate to bills numbered from 100 to 200, before January 16th; and if they relate to bills numbered from 201 and upwards, before January 23rd, and in the case of petitions deposited by leave after the 17th December, must be deposited three clear days before the day first appointed for the examination of the petition (C. S. O. 230).

As soon as the time allowed for depositing memorials has expired, the

word "unopposed" is written in the general list of petitions against each petition in respect of which no such memorial has been deposited; and the petitions are set down for hearing before the Examiners in the order in which they stand in such list, precedence being given, when necessary, to unopposed petitions.

Not less than seven clear days' notice in the Private Bill Office must be given by one of the Examiners of the day appointed for the examination of each petition; and if the promoters do not appear when their petition comes on to be heard, it is struck off the general list of petitions and cannot be re-inserted except by order of the House of Commons (C. S. O. 70).

If the promoters appear, they must prove compliance with the Standing Orders, and for this purpose the Examiner may admit affidavits, or may require further evidence (C. S. O. 76; L. S. O. 77). Any parties who have duly deposited a memorial complaining of non-compliance, are entitled to appear and be heard, by themselves, their agents and witnesses (L. S. O. 73; C. S. O. 74).

After hearing the parties, it is the duty of the Examiner to certify by indorsement on the petition whether the Standing Orders have or have not been complied with; and, when they have not been complied with, to report to the House the facts upon which his decision is founded, and any special circumstances connected with the case (L. S. O. 76; C. S. O. 71). If the Examiner feels doubtful as to the construction of any Standing Order in its application to the particular case, it is his duty to make a special report of the facts, without deciding whether the Standing Order has or has not been complied with, and in such case to indorse the petition with the words "special report," either alone, or, if non-compliance with other Standing Orders has been proved, in addition to the words "Standing Orders not complied with" (C. S. O. 78; L. S. O. 78).

If the Examiner certifies that the Standing Orders have been complied with, and indorses the petition to that effect, it is returned to the agent, who must arrange for its presentation to the House of Commons by a member. If the Examiner reports that the Standing Orders have not been complied with, the report is referred in the House of Commons to the Select Committee on Standing Orders, and after the petition for the bill has been duly presented, such committee report to the House whether such Standing Orders ought or ought not to be dispensed with, and whether in their opinion the parties should be permitted to proceed with their bill, or any portion thereof, and under what (if any) conditions (C. S. O. 199, 92). So, if the Examiner makes a special report, such report is referred to the Select Committee on Standing Orders, who determine, according to their construction of the Standing Order, and on the facts stated in the report, whether the Standing Orders have or have not been complied with, and either report to the House that they have been complied with, or proceed to consider the question of dispensing with the Standing Orders, as the case may be (C. S. O. 199, 94).

Where the Examiner has reported that the Standing Orders have not been complied with, the Select Committee will accept that finding as conclusive on the question of such non-compliance; and where, in a special report, the Examiner has set forth a statement of facts, such finding will be accepted as conclusive with regard to the facts so set forth.

In the case of a special report, the party contending that the Stand-

ing Orders have been complied with must set forth his argument in a written or printed statement, and must strictly confine himself thereto, without entering on the question of dispensation with the Standing Orders, and any opposing party may do the same, under the like limitation; and if the committee decide that the Standing Orders have not been complied with, the further consideration of the case, with a view to the question of the dispensation with Standing Orders, will be postponed to the next meeting of the committee, in order to give time for the preparation of statements relating to that question.

In all cases in which the question arises whether the Standing Orders ought or ought not to be dispensed with, the party praying for such dispensation must set forth, in a written or printed statement, the grounds on which he rests his prayer; and the opposing party must similarly set forth the grounds on which he rests his opposition; both parties confining themselves strictly to the points reported on by the Examiner, or determined by the committee on their consideration of any special report; and at the meeting of the committee both parties must deliver in their statements. When the committee think fit, they may hear the parties in explanation of their statements, and if they desire to hear arguments in addition to such statements, they may call upon the parties to argue any point before them; but only one speech will be allowed on each side, though there may be on one side several parties interested. Copies of all statements intended to be delivered in to the committee must be left with each member of the committee, at his residence, not later than three o'clock, and at the Committee Office not later than one o'clock, in the afternoon of the day preceding that fixed for the meeting of the committee.

A petition praying that any of the Sessional or Standing Orders of the House of Commons relating to private bills may be dispensed with, or opposing the same, may be presented to the House by depositing the same in the Private Bill Office; and every such petition so deposited stands referred to the Select Committee on Standing Orders (C. S. O. 200). Copies of such petitions must be left with each member of the committee, and at the Committee Office, the day before that on which the committee is appointed to meet; and no statement will be received by the committee in addition to the case set forth in any such petition.

A committee, called "the Standing Orders Committee," is also appointed by the House of Lords, whose duties and mode of procedure are similar to those of the Select Committee on Standing Orders of the House of Commons (see L. S. O. 80-85).

If the report of the Select Committee on Standing Orders, or the Standing Orders Committee, as the case may be, is favourable to the bill, and is agreed to by the House, the House will give leave to proceed with the bill. If the report is unfavourable, and is not referred back to the committee for further consideration, the bill is lost for the session.

Progress of Bill through House of Commons.—It is the duty of the Chairman of the Committee of Ways and Means, with the assistance of the counsel to the Speaker, to examine all private bills, whether opposed or unopposed, and to call the attention of the House, and also of the Chairman of the Committee on every opposed bill, to all points which may appear to him to require it; and for this purpose the agent soliciting the bill is required to lay copies of the bill before such

chairman and counsel not later than the day after the Examiner has indorsed the petition for the bill, and again two clear days at least before the day appointed for the consideration of the bill by a committee (C. S. O. 80, 82).

Where the Examiner has indorsed the petition "Standing Orders complied with," the bill must be presented by being laid on the table of the House not later than one clear day after such indorsement, or if when it is indorsed the House is not sitting, then not later than one clear day after the first sitting subsequent to the indorsement, and if the House is not sitting on the latest day on which the bill ought to be laid on the table, the bill must be laid on the first day on which the House again sits. If the Examiner has reported that the Standing Orders have not been complied with, and the Select Committee on Standing Orders, on the report being referred to them, have reported that the Standing Orders ought to be dispensed with, the bill must be presented by being laid on the table not later than one clear day after the House has given leave to proceed with the bill (C. S. O. 196). On the day previous to that fixed for their being laid on the table, all private bills must be deposited in the Private Bill Office, and laid, by one of the clerks of that office, on the table, together with a list of such bills (C. S. O. 195). The bill must be printed, the short title corresponding with that at the head of the advertisement, and if it contains any charges in any way affecting the public revenue, such charges must be printed in italics (C. S. O. 201, 202). Printed copies of the bill must be delivered to the Vote Office for the use of the members before the first reading (C. S. O. 203).

Where the bill is promoted by a company already constituted by Act of Parliament, or by any company, society, association, or copartnership formed or registered under the Companies Act, 1862, or constituted by Royal Charter, letters patent, deed of settlement, or other instrument, and under the management of a committee, directors, or trustees, it must, within five weeks of the date on which the petition was indorsed by the Examiner, be referred to the Examiners, to report as to the compliance or non-compliance with Standing Orders 62 and 63, which require that the bill shall be submitted to and approved of by the proprietors or members of the company, society, association, or copartnership, at a meeting specially held for the purpose (C. S. O. 62, 63; see also C. S. O. 66, 75). There are similar requirements in the case of any such bill brought from the House of Lords, where the provisions originally contained in the bill have been added to or materially altered in that House (C. S. O. 64, 65); and when in any bill brought from the House of Lords for the purpose of establishing a company for carrying on any work or undertaking, any person is specified as manager, director, proprietor, or otherwise concerned in carrying such bill into effect, proof is required before the Examiner that such person has subscribed his name to the petition for the bill, or to a printed copy of the bill, as brought up to the House of Commons (C. S. O. 68). All petitions for additional provisions in private bills, with the proposed clauses annexed, and all private bills brought from the House of Lords, and all bills introduced by the leave of the House in lieu of other bills which have been withdrawn, and all bills to confirm any Provisional Order or provisional certificate, after having been read a first time, are referred to the Examiners, to report as to the compliance or non-compliance with any Standing Orders which have not been previously inquired into (C. S. O. 72, 73, 77).

When laid on the table, the bill is deemed to have been read a first time, and ordered to be read a second time, or referred to the Examiners, as the case may be, on the day on which it is so laid, and is recorded in the votes as having been so read (C. S. O. 197). Except where, as mentioned above, the bill is to be referred to the Examiners after having been read a first time, the next stage is the second reading. The second reading takes place not less than three nor more than seven clear days after the first reading, unless the bill has been referred to the Examiners, in which case it takes place not later than seven clear days after the report of the Examiners, or of the Select Committee on Standing Orders, as the case may be (C. S. O. 204). No petition for additional provisions in any bill will be received unless a printed copy of the proposed clauses is annexed thereto (C. S. O. 198).

After the bill has been read a first time, it is in the custody of the clerks of the Private Bill Office, until laid upon the table for the second reading; and it is the duty of such clerks, between the first and second reading, to examine the bill as to its conformity with the rules and Standing Orders of the House (C. S. O. 233, 234). In the case of any bill by which it is intended to authorise, confirm or alter any contract with any department of the Government whereby a public charge has been or may be created, it is the duty of the Chairman of the Committee of Ways and Means to make a report previously to the second reading; and such report, together with a copy of the contract, and of any resolution to be proposed in relation thereto, will be circulated with the votes two clear days at least before the day on which the resolution is to be considered in committee of the whole House (C. S. O. 81).

Three clear days' notice in writing must be given by the agent for the bill, to the clerks in the Private Bill Office, of the day proposed for the second reading (C. S. O. 235); and if on that day the second reading is opposed, it is postponed until the day on which the House next sits (C. S. O. 207).

When the bill has been read a second time, it is at once referred to a committee; and when committed, is taken by the proper committee clerk into his charge, till reported (C. S. O. 233). It is during the consideration of the bill by the committee that parties interested in opposing it are afforded an opportunity of being heard.

The Chairman of the Committee of Ways and Means may, at any period after the bill has been referred to a committee, report to the House any special circumstances relative thereto which appear to him to require it, or inform the House that in his opinion the bill, though unopposed, should be treated as an opposed bill, in which case, the bill is again referred to the Committee of Selection or General Committee on Railway and Canal Bills, as the case may be (C. S. O. 83, 209).

Parties desiring to oppose any private bill or any bill to confirm any Provisional Order or provisional certificate, must deposit a petition in the Private Bill Office, praying to be heard by themselves, their counsel, or agents, in the case of private bills, on or before the 12th February, and in the case of bills originating in the House of Commons to confirm any Provisional Order or provisional certificate, not later than seven clear days after notice has been given of the day on which the bill will be examined, except where the petitioners complain of any matter which has arisen during the progress of the bill before the committee, or of any

proposed additional provisions, or of the amendments as proposed in the filled up bill deposited in the Private Bill Office. Provided that in the case of any bill brought from the Lords, or any bill as to which compliance with the Standing Orders as to the time for depositing the bill has been dispensed with, or any bill promoted by the London County Council and introduced under S. O. 194, a petition against the bill may be deposited at any time, not later than ten clear days after the first reading of the bill (C. S. O. 128). Every such petition stands referred to the committee on the bill, and the petitioners, subject to the rules and orders of the House, will be heard upon their petition accordingly, if they think fit, and counsel heard, in favour of the bill, against such petition (C. S. O. 210). The petition must distinctly specify the ground on which the petitioners object to any of the provisions of the bill, otherwise it will not be taken into consideration by the committee on the bill; and the petitioners will only be heard on such grounds so stated; and if it appears to the committee that such grounds are not specified with sufficient accuracy, they may require a more specific statement in writing to be delivered (C. S. O. 127).

Every petition in favour of or against the bill (not being a petition for additional provisions) must be presented to the House by depositing the same in the Private Bill Office, and there must be indorsed thereon the name or short title by which the bill is entered in the votes, and a statement that such petition is in favour of or against the bill, as the case may be, together with the name of the member, or party, or agent depositing the same (C. S. O. 205). Any petitioner or memorialist may withdraw his petition or memorial, by depositing in the Private Bill Office a requisition to that effect, signed by him or by the agent who deposited the petition or memorial; and where the petition or memorial is signed by more than one person, any person signing it may withdraw his opposition by a similar requisition (C. S. O. 206).

No petitioners against a private bill will be heard before the committee on the bill, unless their petition has been prepared and signed in strict conformity with the rules and orders of the House, and been presented by having been deposited in the Private Bill Office within the required time (C. S. O. 128, 210). A petitioner against a bill originating in the House of Lords who has discussed clauses in that House is not on that account precluded from opposing the preamble in the House of Commons (C. S. O. 143).

The bill is considered an opposed bill if a petition has been duly presented against it within the required time, in which the petitioners have prayed to be heard, by themselves, their counsel or agents, or if, when no such petition has been presented, the Chairman of the Committee of Ways and Means has reported to the House that in his opinion it ought to be treated as opposed; otherwise, it is treated as unopposed (C. S. O. 107).

If the promoters intend to object to the right of petitioners against the bill to be heard, on the ground that such petitioners have not such an interest in opposing the bill as to give them a *locus standi*, they must give notice of such intention, and of the grounds of their objection, to the clerks to the Referees, and to the agent for the petitioners, according to the rules framed by the Chairman of Ways and Means. The Referees, who consist of the Chairman of Ways and Means, and the Deputy Chairman, with not less than seven other members of the House of Commons appointed by the Speaker, and form one or more Courts, three

at least being required to constitute each Court, decide all questions as to the *locus standi* of opponents to private bills, except where any such question arises incidentally in the course of the proceedings of the committee on the bill (see C. S. O. 87-89). As to what is deemed to be a sufficient interest to give a *locus standi*, and as to the practice and procedure of the Referees, see REFEREES, COURT OF.

Every private bill, not being a railway, canal, or divorce bill, after having been read a second time and committed, stands referred to the Committee of Selection; and if a railway or canal bill, to the General Committee on Railway and Canal Bills; and if a divorce bill, to the Select Committee on Divorce Bills (C. S. O. 208). Provisional Order Bills, after the second reading, also stand referred to the Committee of Selection or the General Committee on Railway and Canal Bills, as the case may be, and are subject to the Standing Orders relating to private bills, so far as they are applicable; provided that when any Order or certificate contained in any such bill is opposed the committee to whom the opposed Order or certificate is referred consider all the Orders or certificates comprised in the bill, and may, if they think fit, divide the bill into two bills, dealing with the opposed and unopposed Orders and certificates respectively, and report them separately (C. S. O. 208a). The Committee of Selection and General Committee on Railway and Canal Bills may form into groups all bills referred to them respectively which, in their opinion, it is expedient to refer to the same committee (C. S. O. 103). See further, as to the functions and proceedings of these committees, and as to the composition of the committees to whom it is their duty to refer opposed and unopposed bills respectively, C. S. O. 98-117, and article on PARLIAMENTARY COMMITTEES.

Subject to Standing Order 211, which provides that there shall be six clear days between the second reading of every private bill, and of every bill to confirm any Provisional Order or provisional certificate, and the sitting of the committee thereon, except in the case of name, naturalisation, and estate bills (not being bills relating to Crown, Church, or corporation property, or property held in trust for public or charitable purposes), in respect of which there shall be three clear days between the second reading and the committee, the Committee of Selection and General Committee on Railway and Canal Bills respectively appoint the time for the first sitting of the committee on every bill referred to the said committees, and also name the bill or bills to be taken into consideration on the first day of the meeting of the committee on any group of bills (C. S. O. 105, 106). The committee on each group of bills take the bill or bills first into consideration which have been so named by the Committee of Selection, or by the General Committee on Railway and Canal Bills; and from time to time appoint the day on which they will enter upon the consideration of each of the remaining bills, and on which they will require the parties promoting or opposing the same to enter appearances; and two clear days' notice, at the least, of such appointment, must be given by the clerk attending the committee to the clerks in the Private Bill Office; and in case the committee postpone the consideration of any bill, notice must be given of the day to which it is postponed (C. S. O. 125).

Each member of the committee on an opposed bill or group of bills must, before he is entitled to attend and vote on such committee, sign a declaration that his constituents have no local interest, and that he has

no personal interest, in the bill, and that he will never vote on any question without having duly heard and attended to the evidence relating thereto; and no such committee may proceed to business until such declaration has been signed by each of the members (C. S. O. 117). And no member, locally or otherwise interested, of a committee on an unopposed bill may vote on any question which may arise, though he is entitled to attend and take part in the proceedings of the committee (C. S. O. 138).

At the first meeting of the committee, copies of the bill, as proposed to be submitted to them, signed by the agent, must be laid by him before each member of the committee (C. S. O. 137). All reports made under the authority of any public department, laid before the House, stand referred to the committee (C. S. O. 212).

The usual course of procedure before the committee is for the counsel appearing in support of the bill to open his case, and then produce his witnesses in support of the allegations contained in the preamble. The witnesses may be cross-examined by the counsel for any opponents who by their petitions have taken objection to the preamble, but not by the counsel for parties who only object to particular clauses in the bill. After being cross-examined, the witnesses may be re-examined by the counsel calling them. The counsel (if any) appearing in opposition to the preamble then opens his case, and produces his witnesses, who may be cross-examined and re-examined; and the counsel for the bill is entitled to reply.

If the committee decide that the preamble has been proved, they proceed to consider the bill section by section, and clause by clause, and parties who object to particular clauses are heard. Amendments or new clauses may be proposed either by the parties or by members of the committee.

All questions before the committee are decided by a majority of voices, including the voice of the chairman; and when the voices are equal, the chairman has a casting vote (C. S. O. 124).

Whether the bill is opposed or unopposed, the Standing Orders in many cases require the committee not to permit the insertion of certain clauses, and to insist on the insertion of others, and to report specially on various matters (see C. S. O. 144-145*a*, 148, 153-175, 179-188*a*). Where it is sought to give Parliamentary sanction to any agreement, the agreement must be annexed to the bill as a schedule, and must be printed *in extenso* therewith (C. S. O. 174); and when the bill is for restoring any letters patent, a true copy of the letters patent must be annexed to the bill, and the total amount of fees due and to become due on the patent must be deposited with the Comptroller-General of Patents before the meeting of the committee on the bill, and the deposit proved before the committee (C. S. O. 175).

If, in the case of an opposed bill, no parties have appeared on the petitions against the bill, or the parties who have appeared have withdrawn their opposition before the evidence of the promoters has commenced, the committee must forthwith refer the bill back, with a statement of the facts, to the Committee of Selection or General Committee on Railway and Canal Bills, as the case may be, and such bill is then dealt with as an unopposed bill (C. S. O. 136).

The bill, having been considered by the committee, must be reported to the House by the Chairman, whether the committee have or have not agreed to the preamble, or gone through the several clauses, or any of

them, or where the parties have announced their intention not to proceed with the bill; and when any alteration has been made in the preamble, such alteration, together with the ground of making it, must be specially stated in the report (C. S. O. 149). If the bill is reported without amendment, and is not a railway or a tramway bill, it is forthwith ordered to be read a third time; but if it has been amended in committee, or is a railway or a tramway bill, it is ordered to lie upon the table for subsequent consideration (C. S. O. 213).

Where the bill is ordered to lie upon the table, it must be printed as amended in committee, at the expense of the promoters, and three clear days at least before the consideration of the bill copies thereof must be delivered to the Vote Office for the use of members, and be laid before the Chairman of the Committee of Ways and Means and the counsel to the Speaker, and be deposited at the office of the Treasury, at the Local Government Board, at the General Post Office, and at the office of the Board of Trade; and in cases of bills required by Standing Orders 33 and 34 to be deposited at other public offices on or before the 18th December, copies must be deposited, as amended in committee, at those offices respectively.

When it is intended to bring up any clause or to propose any amendment on the consideration of the bill, or to propose any verbal amendment on the third reading, notice must be given thereof, in the Private Bill Office, one clear day previous to such consideration or third reading; and such clause or amendment must be printed, and must be submitted by the agent to the Chairman of the Committee of Ways and Means and the counsel to the Speaker, on the day on which notice thereof is given in the Private Bill Office (C. S. O. 85, 217, 242).

In the case of bills ordered to lie upon the table, three clear days must intervene between the report and the consideration of the bill; and no consideration of any such bill will take place unless the Chairman of the Committee of Ways and Means has informed the House, or signified in writing to the Speaker, whether the bill contains the provisions required by the Standing Orders (C. S. O. 215); and no clause or amendment may be offered in the House on the consideration of the bill, nor any verbal amendment on the third reading of any private bill, unless such Chairman has informed the House, or signified in writing to the Speaker, whether, in his opinion, such clause or amendment is such as ought or ought not to be entertained by the House, without reference thereof to the Select Committee on Standing Orders (C. S. O. 216). When any such clause or amendment is referred to the Select Committee on Standing Orders, they report to the House whether the clause or amendment should be adopted by the House or not, or whether the bill should be recommitted (C. S. O. 97); and no further proceeding may be taken until their report has been brought up (C. S. O. 218). If the bill is recommitted, a filled-up bill, as proposed to be submitted to the committee on recommitment, must be deposited in the Private Bill Office two clear days before the meeting of the committee; and a copy of the proposed amendments must be furnished by the promoters to such parties petitioning against the bill as apply for it one clear day before the meeting of the committee (C. S. O. 237).

One clear day's notice must be given to the clerks of the Private Bill Office of the day proposed for the third reading of the bill, and such notice may not be given until the day after that on which the bill has been ordered to be read a third time (C. S. O. 243). No amendments,

not being merely verbal, may be made on the third reading (C. S. O. 219).

When the bill has been read a third time, it must be printed fair, at the expense of the promoters; and after having been examined by the clerks in the Private Bill Office, it is, if it originated in the House of Commons, sent up to the House of Lords (C. S. O. 221, 245). If it is a bill brought from the House of Lords, a message is sent to that House stating that the bill has been passed, with or without amendments, and if with amendments, desiring the concurrence of the House of Lords thereto.

All amendments made by the House of Lords to a bill sent up from the Commons must be printed at the expense of the parties, and circulated with the votes, prior to such amendments being taken into consideration; and where any clause has been amended, it must be printed *in extenso*, with every addition or substitution in different type, and the omissions therefrom included in brackets and underlined, unless the Chairman of the Committee of Ways and Means considers such printing unnecessary; and when any amendments are intended to be proposed to the Lords' amendments, such proposed amendments must also be printed in like manner (C. S. O. 220). A copy of all such amendments, and proposed amendments thereto, must be laid by the agent before the Chairman of the Committee of Ways and Means and the counsel to the Speaker, before two o'clock on the day previous to that on which they are respectively appointed for consideration by the House (C. S. O. 86).

Progress through House of Lords.—It is not necessary to present any petition to the House of Lords for leave to bring in a local bill sent up from the Commons, or for which a petition has been presented to the House of Commons, and which, by arrangement between the Chairman of the Committee of Ways and Means and the Chairman of Committees of the House of Lords, is to be first considered in the Upper House. But no local bill for which a petition has not been presented in the House of Commons may be brought into the House of Lords except on petition for leave to bring in the bill, a printed copy of which must be annexed to the petition (L. S. O. 86).

The bill must be presented to the House by one of the Lords, and will be read a first time after the Examiner has certified whether the Standing Orders have or have not been complied with; and in the case of a bill originating in the House of Lords, the first reading will be not later than three clear days after the certificate of the Examiner has been laid on the table (L. S. O. 86a).

Where the bill has been brought from the House of Commons, it will, after the first reading, be referred to the Examiners, to certify as to the compliance or non-compliance with any Standing Orders which have not been previously inquired into; and in the case of any Provisional Order Confirmation Bill in which provisions have been inserted in the House of Commons to which the Standing Orders of the House of Lords would apply if it were a local bill, the Examiners inquire whether, with respect to those provisions, the Standing Orders have been complied with (L. S. O. 70a, 87). Standing Orders 60 and 60a require that copies of bills brought from the House of Commons shall, in certain cases, be deposited at the offices of public departments; and whenever, in the case of a bill of the second class, any alteration has been made in the work authorised by the bill, during its progress through the House of Commons, proof must be given before the Examiners that

notice of the alteration has been advertised, and plans and sections deposited, and the making of the alteration consented to, as provided by Standing Order 61; but compliance with Standing Order 61 is not necessary in the case of alterations made on petition for additional provision in the House of Commons. Where the bill is promoted by a company, proof must also be given before the Examiner, before the second reading, that the requirements of Standing Orders 62-66 and 68 have been complied with. These orders, as well as Orders 3-59, are practically identical with the corresponding Orders of the House of Commons (see *ante*).

One of the Examiners will give at least two clear days' notice of the day on which the bill or any petition for additional provision will be examined; but in the case of a bill for confirming any Provisional Order or certificate, such notice will not be given until after the bill has been printed by order of the House (L. S. O. 72). Parties who have duly deposited memorials, complaining of a non-compliance with the Standing Orders, are entitled to appear and be heard (L. S. O. 73, 74). Every such memorial must be deposited, together with two copies thereof, in the office of the Clerk of the Parliaments before twelve o'clock on the day preceding that appointed for the examination (L. S. O. 75).

If the Examiner certifies that the Standing Orders have not been complied with, or makes a special report, such certificate or report is referred to the Standing Orders Committee, and such committee report to the House whether the Standing Orders ought or ought not to be dispensed with, or, in case of a special report, whether they have or have not been complied with, and if not, whether they ought to be dispensed with (L. S. O. 83, 84).

The bill, if originating in the House of Lords, will not be read a second time earlier than the fourth day nor later than the seventh day after the first reading, except where it has been referred to the Examiners after the first reading, in which case it will be read a second time not later than the fourteenth day after the first reading, and if the Examiner has certified that the Standing Orders have not been complied with, then not later than the second day on which the House sits after the report from the Standing Orders Committee recommending that the bill be allowed to proceed (L. S. O. 91). If brought from the House of Commons, the bill will not be read a second time until the Examiner has certified whether any further Standing Orders are applicable, and if so, whether they have or have not been complied with (L. S. O. 87); and no Provisional Order Confirmation Bill will be read a second time until the Examiner has certified whether the Standing Orders have or have not been complied with (L. S. O. 88). All petitions for additional provision in bills originating in the House of Lords are, on presentation, referred to the Examiners for report in respect of all orders which would have been applicable in the case of a bill (L. S. O. 71).

No petition praying to be heard upon the merits against the bill will be received unless it is deposited in the Private Bill Office, in the case of a local bill originating in the House of Lords, on or before the 19th February, and in the case of a Provisional Order Confirmation Bill or bill presented on petition, on or before the seventh day after the second reading; and in the case of a bill brought from the House of Commons, on or before the seventh day after the first reading (L. S. O. 92, 93). No petition for additional

provision may be presented without the sanction of the Chairman of Committees, and no such petition will be received in the case of a bill brought from the House of Commons (L. S. O. 94).

The effect of the second reading is to affirm the principle of the bill, subject to proof of the allegations in the preamble, and as in the House of Commons, the bill after being read a second time, is immediately committed. If opposed, it is referred to a select committee of five Lords, nominated by the Committee of Selection (see PARLIAMENTARY COMMITTEES); and if unopposed, to the Chairman of Committees (L. S. O. 96, 97).

The Chairman of Committees may report that any unopposed bill on which he sits as chairman should be proceeded with as an opposed bill (L. S. O. 95); and in all cases of opposed local bills, in which no parties have appeared on the petitions against the bills, or having appeared, have withdrawn their opposition before their case has been fully opened, or whose *locus standi* has been disallowed, the committees on the bills will report accordingly to the House, and the bills will thereupon be referred to the Chairman of Committees, to be dealt with by him as if originally unopposed; provided that the committee may require the preamble of the bill to be proved in any case in which an application for costs has been made (L. S. O. 102). Provisional Order Confirmation Bills, before being committed to a committee of the whole House, are, as respects any unopposed orders scheduled thereto, referred to the Chairman of Committees to be dealt with in the same manner as unopposed local bills (L. S. O. 102*b*).

The proceedings and functions of the committee are similar to those of the committee on the bill in the House of Commons (see L. S. O. 103-140*a*); and as in the House of Commons, the committee are required by the Standing Orders to insist on the insertion of certain clauses and restrictions (see L. S. O. 107-140*a*). Two clear days at least before the day appointed for the consideration of a bill by the committee, the agent must lay before the Chairman of Committees a copy of the bill proposed to be submitted to the committee (L. S. O. 140*b*). A petitioner against a bill originating in the House of Commons, who has discussed clauses of the bill in that House, is not on that account precluded from opposing the preamble of the bill in the House of Lords (L. S. O. 102*a*). In the House of Lords, all questions of *locus standi* are decided by the committee on the bill (see L. S. O. 105-105*d*).

If any amendments have been made in committee, the bill must be reprinted, as amended, previously to the third reading, unless the Chairman of Committees considers the reprinting to be unnecessary (L. S. O. 145); and a copy of the bill, as amended, must be deposited at the Treasury, at the Local Government Board, and at the General Post Office, and in the case of a railway, tramway, tramroad, or subway bill, also at the office of the Board of Trade, three days before the bill is read a third time (L. S. O. 143, 143*a*). The Chairman of Committees may propose to the House that any local bill shall, after it has been reported, be committed to a committee of the whole House; but no such bill is, by reason of such a commitment, allowed to proceed as a public bill (L. S. O. 142).

No amendment may be moved on the report or third reading, unless it has been submitted to the Chairman of Committees, and copies of the amendment deposited in the office of the Clerk of the Parliaments

one clear day at least prior to the report or third reading of the bill (L. S. O. 144).

When the bill has been read a third time, it is, if it originated in the House of Lords, sent to the House of Commons. If it is a bill brought from the House of Commons, a message is sent to that House, stating that the bill has been passed, with or without amendments, and if with amendments, desiring the concurrence of the House of Commons thereto.

When the bill as brought from the one House is passed by the other House without amendment, or when the amendments made by either House are agreed to by the other, the bill is ready for the royal assent.

As to the introduction and passing of personal bills, see L. S. O. 149-181; C. S. O. 188*a*-192; and see PERSONAL ACT.

Costs.—The Act of 28 & 29 Vict. c. 27 gives power to committees on private bills, in certain cases, to award costs to the promoters or opponents thereof. The taxation and payment of the costs of parliamentary agents and solicitors employed in promoting or opposing private bills are regulated by the House of Commons Costs Taxation Act, 1847, 10 & 11 Vict. c. 69, and the House of Lords Costs Taxation Act, 1849, 12 & 13 Vict. c. 78.

When the committee on a private bill decide that the preamble is not proved, or when they insert, strike out, or alter any provision in the bill, for the protection of any petitioner, and further unanimously report that any petitioner has been unreasonably or vexatiously subjected to expense in defending his rights, such petitioner is entitled to recover from the promoters his costs in relation to the bill, or such portion thereof as the committee think fit, such costs to be taxed by the Taxing Officer of the House, or the committee may award such a sum for costs as they think fit, with the consent of the parties affected (28 & 29 Vict. c. 27, s. 1). When the committee decide that the preamble is proved, and further unanimously report that the promoters of the bill have been vexatiously subjected to expense in the promotion thereof by the opposition of any petitioners against the same, then the promoters are entitled to recover from the petitioners, or such of them as the committee think fit, such portion of their costs of the promotion of the bill as the committee think fit, to be taxed by the Taxing Officer of the House, or such a sum for costs as the committee name, with the consent of the parties affected. But no landowner, who *bonâ fide* at his own sole risk and charge opposes a bill which proposes to take any portion of his property for the purposes of the bill, is liable to any costs in respect of his opposition to such bill (*ibid.*, s. 2).

The Taxing Officer is required, on application, to tax the costs and deliver to the parties affected a certificate of the amount, or in cases where a sum for costs has, by consent, been named by the committee, to deliver a certificate expressing the sum so named, with the name of the party liable to pay, and the name of the party entitled to receive the same; and such certificate is conclusive evidence as well of the amount of the demand as of the title of the party therein named to recover the same (*ibid.*, s. 3).

Where an action is brought for the recovery of costs in respect of which such a certificate has been given, it is sufficient for the plaintiff to allege in his statement of claim that the defendant is indebted to him in the sum mentioned in the certificate, and upon filing such statement of claim, together with the certificate and an affidavit of the demand, the

plaintiff is entitled to sign judgment for the amount, unless the defendant has obtained leave from the Court to deliver a defence. The defendant cannot deliver a defence to such an action without leave of the Court, whether on the ground that the committee had no jurisdiction to order him to pay the costs or otherwise. But the Court may set aside the judgment and give leave to defend, or may give leave to deliver a defence before judgment is signed, on the ground that the committee had no jurisdiction in the particular case (*Mallet v. Hanley*, 1887, 18 Q. B. D. 303; 28 & 29 Vict. c. 27, s. 5). Where a company petitioned against a bill, and the committee ordered certain directors of the company to pay a portion of the costs of the promoters, on the ground that such directors were substantially the petitioners, it was held that such order was made without jurisdiction and was not enforceable, the directors not being the actual petitioners (*Mallet v. Hanley*, 1887, 18 Q. B. D. 787).

No parliamentary agent or solicitor can maintain any action for the recovery of any costs, charges, or expenses in respect of proceedings in either House relating to a private bill, until the expiration of one month after a signed bill of costs has been delivered or sent to the party to be charged; provided that a judge of the High Court may authorise the commencement of an action before the expiration of a month from the delivery of the bill of costs, on proof that there is probable cause for believing that such party is about to quit the United Kingdom (10 & 11 Vict. c. 69, s. 2; 12 & 13 Vict. c. 78, s. 2).

The Speaker and the Clerk of the Parliaments (or in his absence the Clerk Assistant) respectively appoint the Taxing Officers of the respective Houses, and may from time to time prepare lists of the charges to be allowed upon the taxation of any such bills of costs, charges, and expenses in the respective Houses; and for the purpose of any such taxation the Taxing Officer may examine the parties and witnesses upon oath, and call for the production of any books or writings in the hands of any party to the taxation, and may demand and receive for any such taxation such fees as may from time to time be authorised by any order of the House of Commons or of the House of Lords, as the case may be, and award the costs of the taxation against either party, or in such proportion against each party as he thinks fit (10 & 11 Vict. c. 69, ss. 3-7; 12 & 13 Vict. c. 78, ss. 3-7).

Upon the application of any person upon whom a demand in respect of any such costs, charges, or expenses has been made, or of any parliamentary agent or solicitor making any such demand, the Taxing Officer, on receiving a true copy of the bill of costs, which has been duly sent or delivered to the party charged, must proceed to tax and settle the same; and if either party, having due notice, neglects to attend, he may proceed *ex parte*; and if, pending such taxation, any action is commenced to recover the costs, charges, or expenses, all proceedings in the action must be stayed until the amount of the bill has been certified by the Speaker, or by the Clerk of the Parliaments, or Clerk Assistant, as the case may be. But no such application, if made by the party charged with the bill, may be entertained by the Taxing Officer after a verdict has been obtained or writ of inquiry executed in any action for the recovery of the demand, or, except by special direction of the Speaker, or of the Clerk of Parliaments, or Clerk Assistant, as the case may be, after the expiration of six months after the delivery of the bill (*ibid.*, s. 8).

The Taxing Officer, if required by either party, must report his

taxation to the Speaker, or to the Clerk of the Parliaments, or Clerk Assistant, as the case may be, and within twenty-one days either party may deposit a memorial complaining of such report, and the Speaker or Clerk of the Parliaments or Clerk Assistant may require a further report, and, if necessary, direct the Taxing Officer to amend his report; and if no such memorial is deposited, or so soon as the matters complained of have been finally disposed of, the Speaker, or the Clerk of Parliaments or Clerk Assistant, may issue a certificate of the amount due, and such certificate is binding and conclusive on the parties, and in any action for the recovery of the amount so certified has the effect of a warrant of attorney to confess judgment; but if in any such action the defendant pleads that he is not liable to the payment of the costs, charges, or expenses, the certificate is only conclusive as to the amount thereof, and not as to the liability of the defendant (*ibid.*, s. 9).

A party desiring to enforce payment of costs for which the Speaker's certificate has been given should apply to the Train-Bearer to the Speaker with an affidavit to be made by him verifying the certificate, the fees payable being 10s. 6d. to the Train-Bearer, and 2s. 6d. to the Commissioner for swearing the affidavit. The Speaker's certificate and affidavit of verification should then be filed at the Bills of Sale Department, Central Office (fee 5s.), and a certificate of registration be obtained (fee 2s. 6d.). Then, on filing the certificate of registration, together with an appearance (fee 2s.), entered on behalf of the defendant, at the Judgment Department, Central Office, judgment may be entered for the amount of costs certified by the Speaker (fees 10s., and office copy 6d.), and may be enforced by execution, the foundation of the proceedings being the existence of an imaginary action, which are being taken *pro confesso*, according to the ancient practice of the Court. On entering the judgment a reference number is given as for an action, which is intitled in the King's Bench Division, the party recovering being the plaintiff, and party liable the defendant, and the record is entered up in the cause book. The applicant is allowed, as of course, his out-of-pocket expenses, £1, 13s., and £1, 1s. for costs of judgment—£2, 14s. in all—but may if he chooses have his costs taxed. Forms of the Speaker's certificate, affidavit of verification, certificate of registration, and judgment are appended to this article.

If any bill of costs, taxable by virtue of either of the Acts, comprises any costs, charges, or expenses incurred in respect of a private bill, but not taxable by virtue of the Act, the Taxing Officer of the House of Lords or of the House of Commons, as the case may be, may either tax and settle such costs, charges, and expenses himself, or request the Taxing Officer of the other House, or the proper officer of any other Court, to assist him in taxing and settling any part of such bill (12 & 13 Vict. c. 78, ss. 10-13).

[*Authorities.*—May's *Parliamentary Practice*; Clifford's *History of Private Bill Legislation*; Dodd and Wilberforce on *Private Bill Procedure*.]

TABLE OF FEES.

HOUSE OF LORDS.

LOCAL OR PERSONAL BILLS.

	£	s.	d.
Deposit of Plan	0	10	0
Notice or Order for consideration of Standing Order in order to its being dispensed with	1	0	0
Order thereon	1	0	0
Certificates of Examiners in case of any one Bill	5	0	0
Order referring Certificate to Standing Orders Committee	1	0	0
Standing Orders Committee thereon	5	0	0
Report of Standing Orders Committee	2	0	0

FIRST READING	5	0	0
Notice of Second Reading	0	10	0

SECOND READING :

PERSONAL BILLS :

Estate	}	81	0	0
Patent				
Disabilities Removal	}	27	0	0
Divorce				
A. Naturalisation				
Name				
Oath				

(No Second Reading fee is charged upon an Indemnity or Restoration Bill.)

LOCAL BILLS :

Bills where the capital or money to be raised does not exceed £50,000	81	0	0
exceeds £50,000 and does not exceed £200,000	108	0	0
exceeds £200,000, or is not defined in amount	135	0	0
Bills relating to charitable, literary, or scientific pur- poses whereby no private profit or advantage is derived	27	0	0
Other Bills	81	0	0
Order referring Petition for Estate Bill to Judges	1	0	0
Every Petition in favour of or against a Bill not praying to be heard	1	0	0
Every Petition praying to be heard against a Bill	}	2	0
„ in favour of a Bill and praying to be heard against alteration therein			
For the first or first and second days on which an Agent only appears in support of a Petition	3	0	0
For every subsequent day	1	0	0
For the first day on which Counsel appear in support of a Petition	10	0	0
For every subsequent day	4	0	0
Order for attendance of witnesses, each witness	1	0	0
Every witness to whom an Oath or Affirmation is administered at the Bar of the House	1	0	0
Every witness to whom an Oath or Affirmation is administered before a Committee	0	2	0

	£	s.	d.
Petition for additional provision	5	0	0
Certificate of Examiner thereon	5	0	0
Report of Judges on Petition for Estate Bill	1	0	0
Commitment of an Unopposed Bill	1	0	0
" " Opposed Bill, Committee to be proposed by Committee of Selection	2	0	0
Report of Committee of Selection	1	0	0
Order for Committee on Opposed Bill to meet	1	0	0
Order giving leave for Counsel to be heard before a Committee	1	0	0
For the first day on which Counsel appear in support of Bill	8	0	0
For every subsequent day	4	0	0
Committee on any Personal Bill in division marked A	2	0	0
" on any other Bill	5	0	0
Report, Estate Bill	5	0	0
Report, any other Bill, with Amendment	4	0	0
" " " without "	2	0	0
Report, Bill not to proceed	1	0	0
Order on Report that Promoters do not intend to proceed further with Bill	1	0	0
Notice of Third Reading	0	10	0

THIRD READING :

Bill (H.L.) containing not more than 20 pages of print	10	0	0
" containing more than 20 pages	15	0	0
Amendments on Third Reading	3	0	0
{ H.L. Bills	5	0	0
{ H.C. Bills	5	0	0
Producing before a Committee of the House of Commons any document or proof	1	0	0

PROVISIONAL ORDER CONFIRMATION BILLS.

The same fees are charged to promoters and opponents at the Committee stage in the case of opposed Bills as in the case of Local Bills.

No other fees are charged.

GENERAL FEES.

For every Certificate signed by the Chairman of Committees	2	0	0
Inspection of a Plan or other Document	0	5	0
Copy of Document, per folio of 72 words	0	0	6
The inspection fee to be charged in addition when the Document is two years old and upwards.			
Copies of Documents earlier than Geo. III. to be charged double the above fees.			
Copy certified by the Clerk of the Parliaments	1	0	0
in addition to the above.			

FEES ON TAXATION.

For every application or reference to the Taxing Officer of the House of Lords, for the Taxation of a Bill of Costs	1	0	0
£1 per cent. upon the amount of the Bill as sent in for taxation, or added to on taxation.			
On the deposit of every Memorial complaining of a Report of the Taxing Officer	1	0	0
For every Certificate signed by the Clerk of the Parliaments or Taxing Officer	1	0	0
For Copies of any Documents in the office of the Taxing Officer, per folio of 72 words	0	0	6

FEES TO BE TAKEN BY THE SHORTHAND WRITER.

	£	s.	d.
For every day he shall attend	2	2	0
For the Transcript of his Notes, per folio of 72 words	0	0	9

HOUSE OF COMMONS.

FEES TO BE PAID BY THE PROMOTERS OF A PRIVATE BILL.

On the deposit of the Petition, Bill, Plan, or any other Document in the Private Bill Office	5	0	0
For every day on which the Examiners shall inquire into the compliance with the Standing Orders	5	0	0

For Proceedings in the House.

On the presentation of the Bill	5	0	0
On the First Reading of the Bill	15	0	0
On the Second Reading of the Bill	15	0	0
On the Report from the Committee on the Bill	15	0	0
On the Third Reading of the Bill	15	0	0

Bills from the Lords, commonly called Estate Bills, Divorce Bills, Naturalisation Bills, and Name Bills, to be charged only one-half of the preceding Fees.

The preceding Fees on the Presentation, First, Second, and Third Readings, and Report, to be increased according to the money to be raised or expended under the authority of any Bill for the execution of a work, in conformity with the following scale:—

If the sum be £100,000 and under £500,000, twice the amount of such Fees.

If the sum be £500,000 and under £1,000,000, three times the amount of such Fees.

If the sum be £1,000,000 and above, four times the amount of such Fees.

For Proceedings before any Committee or the Referees.

For every day on which the Committee or the Referee shall sit,—	£	s.	d.
If the Promoters of the Bill appear by Counsel	10	0	0
If they appear without Counsel	5	0	0

FEES TO BE PAID BY THE OPPONENTS OF A PRIVATE BILL.

On the deposit of every Memorial complaining that the Standing Orders have not been complied with	1	0	0
On the presentation or deposit of every Petition against a Private Bill	2	0	0

For Proceedings before the Examiners, or before any Committee, or the Referee.

For every day on which the Examiners shall inquire into any Memorial complaining of a non-compliance with the Standing Orders	3	0	0
For every day on which the Petitioners appear before any Committee or the Referees	2	0	0

GENERAL FEES.

On every Motion, Order, or Proceeding in the House upon a Private Bill, Petition, or matter not otherwise charged	1	0	0
---	---	---	---

	£	s.	d.
For Copies of all Papers and Documents, at the rate of 72 words in every folio—			
If five folios or under	0	2	6
If above five folios, per folio	0	0	6
For the Copy of a Plan made by the parties	1	0	0
For the inspection of a Plan, or of any Document	0	5	0
For every Plan or Document certified by the Speaker pursuant to any Act of Parliament	10	0	0
For every day on which any parties shall be heard by Counsel at the Bar from each side	10	0	0
For every day on which a Committee of the whole House shall sit on a Private Bill or matter	6	0	0
For serving any Summons or Order on a Private Bill or matter	1	0	0
For every Order for the commitment or discharge of any person	1	0	0
For taking any person into custody for a Breach of Privilege or Contempt	5	0	0
For taking any person into custody for any other cause	2	0	0
For every day on which any persons shall be in custody	1	0	0
For Riding Charges, per mile	0	0	6

FEES TO BE PAID ON THE TAXATION OF COSTS ON PRIVATE BILLS.

For every application or reference to "The Taxing Officer of the House of Commons," for the Taxation of a Bill of Costs	1	0	0
For every £100 of any Bill which shall be allowed by the Taxing Officer	1	0	0
On the deposit of every Memorial complaining of a Report of the Taxing Officer	1	0	0
For every Certificate which shall be signed by the Speaker	1	0	0
For Copies of any Documents in the office of the Taxing Officer, per folio of 72 words	0	1	0

FEES TO BE TAKEN BY THE SHORTHAND WRITER.

For every day he shall attend	2	2	0
For the Transcript of his Notes, per folio of 72 words	0	0	9

FORMS.

1. Speaker's Certificate for Costs.
2. Affidavit Verifying Speaker's Certificate.
3. Certificate of Registration of Speaker's Certificate.
4. Judgment on Speaker's Certificate.

SPEAKER'S CERTIFICATE FOR COSTS.

In the matter of the promotion by _____ of the
Bill, 19 ____.

WHEREAS on the _____ day of _____ 19____, _____ Esquire, the Taxing Officer of the House of Commons, did report to me in pursuance of the House of Commons Taxation Act, 1847, that application had been made to him pursuant to the said Act for the taxation of the costs, charges, and expenses charged by Messrs.

of _____, Parliamentary agents, in the above matter, and that having been attended by the parties to such taxation he had accordingly taxed and settled such costs, charges, and expenses pursuant to the said Act.

AND WHEREAS in such report the said taxing officer did state the amount fairly chargeable in respect of such costs, charges, and expenses, together with the costs and fees payable in respect of such taxation: NOW, in further pursuance of said Act, I do hereby certify that the costs, charges, and expenses were allowed in such report at the sum of four hundred and thirty-seven pounds, ten shillings and eightpence, and that the costs and fees payable in respect of such taxation amounting to the sum of seven pounds, nineteen shillings, were charged by such taxing officer as stated in such report against the above named _____.

Given under my hand this _____ day of _____ 19 ____
(Signed)

Speaker.

AFFIDAVIT VERIFYING SPEAKER'S CERTIFICATE.

In the High Court of Justice, King's Bench Division.

BETWEEN A. B. & Co., *Plaintiffs,*

and

The _____ Co., *Defendants.*

I, A. B., of the Palace of Westminster, in the City of Westminster, train-bearer to the Speaker, make oath and say as follows:—

1. That the original Certificate of the Speaker of the House of Commons annexed hereto was duly signed by the therein-named Speaker of the House of Commons on the day the same bears date, being the _____ day of _____ One thousand nine hundred and _____, and that the name "James W. Lowther" set and subscribed thereto is of the proper handwriting of the said James W. Lowther, and that he, the said James W. Lowther, did sign the said certificate.

Sworn at the Palace of Westminster in the City of Westminster this _____ day of _____ 19 ____.

Before me,

A Commissioner for Oaths.

CERTIFICATE OF REGISTRATION OF SPEAKER'S CERTIFICATE.

19 __, B No. ____.

*Supreme Court of Judicature, Central Office,
Bills of Sale Department.*

It is hereby certified that a warrant of attorney to confess judgment made or given by James W. Lowther of the Palace of Westminster, Speaker of the House of Commons, certifying £445, 9s. 8d. payable

to A. B. & Co. by the	Co. in respect of certain costs, charges,
and expenses, and dated the	day of 19 , was
registered at the office on the	day of 19 .
Dated this	day of 19 .

JUDGMENT ON SPEAKER'S CERTIFICATE.

In the High Court of Justice, King's Bench Division.

19 , B No.

BETWEEN A. B. & Co., Plaintiffs,

and

The Co., Defendants.

The day of 19 .

WHEREAS a Speaker's Certificate of the House of Commons, dated the day of 19 , duly signed by the said Speaker, has been granted unto Messrs. A. B. & Co. in respect of costs, charges, and expenses charged by them in the matter of the promotion by the Co. of the Bill, 19 : AND WHEREAS it is enacted by the House of Commons Taxation of Costs Act, 1847, 10 & 11 Vict. c. 69, s. 9, that such Speaker's Certificate shall be equivalent to and shall have the effect of a warrant of attorney to confess judgment: AND such certificate having been duly filed in the Bills of Sale Department of the Central Office as appears by a certificate thereof produced at the time of entering this judgment: IT IS THIS DAY ADJUDGED that the plaintiffs recover against the said defendants £445, 9s. 8d. and £2, 14s. costs.

Original warrant of attorney filed the day of 19 .

Private Bill Office.—See PRIVATE BILL LEGISLATION.

Private Chapels.—See PROPRIETARY CHAPELS.

Private Charity.—See CHARITIES, Vol. II., at p. 683.

Private Documents.—See EVIDENCE, Vol. V., at pp. 372, 375; PUBLIC RECORDS AND DOCUMENTS.

Private Dwelling-House.—A covenant not to use a house "for any trade or manufacture, or for any other purpose than a private residence," is broken by using it as a boarding-house for scholars attending a neighbouring school kept by the owner of the house; for in such a case the covenantor is really using the house as a boarding-house, and not as a private residence in the ordinary acceptation of the term (*Hobson v. Tulloch*, [1898] 1 Ch. 424; see also *German v. Chapman*, 1877, 7 Ch. D. 271, and *Rolls v. Miller*, 1884, 27 Ch. D. 71). In such covenants the words "and not for any purpose of trade or business," or similar words, are commonly added, and they in fact imply the user of the house as a private dwelling-house only, even if those words are absent (*Rolls*

v. *Miller, ubi supra*); while the user of a house as a private residence precludes the carrying on of a business there (*Hobson v. Tulloch, ubi supra*). As to the various structural and sanitary requirements of dwelling-houses, see articles PUBLIC HEALTH; DRAINS AND SEWERS; WATER SUPPLY.

Privateering.—Armed cruising of private ships commissioned by a belligerent State to carry on operations of war against the enemy. The vessel so armed and commissioned is called a *privateer*, and the commission is granted by *letters of marque*.

Privateers are to be distinguished from private vessels converted into ships of war by the belligerent, and manned by their proper naval officers. The former are fitted out by the owners at their own expense, and it was usual to allow them to keep, by way of remuneration, what they could take from the enemy, after giving the admiral his share. They had further to find security for good behaviour; and other means, such as liability to search by public vessels of the country whose flag they carried, were taken, to secure that they did not violate the laws of war (Lawrence, *Principles of International Law*, 1895, p. 417). It was usual for the Lords of the Admiralty to institute proceedings in the Admiralty Court upon complaint of ill-conduct. Moreover, as a privateer is not invested with a public character, neutral ships of war are permitted to verify the lawfulness of the commission under which she sails (Hall, *International Law*, 5th ed., 1904, p. 526).

The commissioning of privateers, though once universally resorted to by belligerent States, has fallen practically into disuse. In the war of 1854, both Great Britain and France notified that they would carry on the hostilities at sea by their armed public ships exclusively, and at the Congress of Paris a declaration abolishing the practice of privateering was agreed to among the signatory States (see the articles DECLARATION OF PARIS).

In future warfare, while the declaration remains in force, privateers cannot be lawfully commissioned by the signatories of that declaration against any of the States which are parties thereto. The only States which have hitherto refused to be pledged to this abolition are the United States, Spain, Mexico, Venezuela, and Bolivia. In the war between the United States and Spain in 1898, however, both belligerents, though not parties to, and therefore not bound by, the declaration, decided not to employ privateers. The Government of the United States expressly declared its intention "not to resort to privateering, but to adhere to the rules of the Declaration of Paris."

See the article BELLIGERENT as to the construction of the abolition clause in the Declaration of Paris; see also the articles DECLARATION OF PARIS; VISIT AND SEARCH.

A convention relative to the conversion of merchant ships into war-ships was concluded at The Hague Conference in 1907, which, after reciting that it was desirable, in view of the incorporation in time of war of merchant ships in the fighting fleet, to define the conditions subject to which this operation may be effected, and that the contracting Powers, however, having been unable to come to an agreement on the question whether the conversion of a merchant ship into a warship may take place on the high seas, it was understood that the question of the

place where such conversion is effected remained outside the scope of the agreement, and was in no way affected by the following rules, made the following provisions:—

A merchant ship converted into a warship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control and responsibility of the Power whose flag it flies (Art. I.).

Merchant ships converted into warships must bear the external marks which distinguish the warships of their nationality (Art. II.).

The commander must be in the service of the State, and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet (Art. III.).

The crew must be subject to military discipline (Art. IV.).

Every merchant ship converted into a warship must observe in its operations the laws and customs of war (Art. V.).

A belligerent who converts a merchant ship into a warship must, as soon as possible, announce such conversion in the list of warships (Art. VI.).

These provisions do not apply except between the contracting Powers, and then only if all the belligerents are parties to the Convention (Art. VII.).

For the text of this Convention, see Parl. Papers, 1908, Cd. 3857.

Private Hearing.—See CAMERA, IN.

Private Improvements.—See IMPROVEMENT OF LAND; SETTLED LAND ACTS.

Private International Law.

TABLE OF CONTENTS.

1. DEFINITION AND NATURE	602	(i) Lunacy	612
2. HISTORICAL	603	(j) Copyright	613
3. RULES OF, AND THEIR GENERAL APPLICATION	604	(k) Ships	613
4. SPECIAL APPLICATION OF RULES	605	(l) Collisions	614
(a) Status and Capacity	605	(m) Bankruptcy	614
(b) Status of Foreign Corporations	607	(n) Jurisdiction	615
(c) Form of Documents	608	(o) Procedure, Evidence, Foreign Judgments	615
(d) Contract	608	(p) Limitation of Actions	615
(e) Realty (Immovables)	610	(q) Torts	616
(f) Successions to Personal Estate (Movables)	610	(r) Criminal Offences	616
(g) Husband and Wife	611	5. PROOF OF FOREIGN LAW	617
(h) Guardianship	612	6. PROJECTS TO ASSIMILATE PRIVATE INTERNATIONAL LAW	617
		7. AUTHORITIES	617

1. DEFINITION AND NATURE.

"Private International Law," says Prof. Westlake, "is that department of national law which arises from the fact that there are in the world different territorial jurisdictions possessing different laws" (*Private International Law*, 4th ed., 1905, p. 1). As to the reasons which have been given by different authors for and against the use of the term, see the article CONFLICT OF LAWS.

An extension of the meaning of Private International Law is given by Prof. Lainé, who defines it as "regulating . . . the relations which are or ought to be established between States from the point of view of the particular interests of their subjects, and with special reference to the conflict of their laws" (*Introduction au droit international privé*, p. 17).

Prof. André Weiss embraces under the heading Private International Law—(1) Nationality; (2) the rights of foreigners; (3) conflict of laws, forming a branch apart from the rights of foreigners; (4) conflicts of jurisdiction and procedure; and (5) the execution of foreign judgments. This system places in the domain of Private International Law matters which do not fall logically under the heading of conflict of laws, and yet are not a part of international law as the law governing the relations between States (see the articles INTERNATIONAL LAW; STATE).

Felix is generally credited with having originated the term. "International Law," he says, "is divided into public law and private law. Public international law regulates the relations between nation and nation; or, in other words, it treats of conflicts of public law. The *ensemble* of the rules, according to which conflicts between the private law of different nations is called Private International Law; in other words, private international law is composed of rules relative to the application of the civil or criminal law of any State in the territory of a foreign State" (*Droit international privé*, p. 2). This author does not, as is seen, claim to invent the term, which he probably borrowed through a mistranslation from Germany, where the term *Internationales Privatrecht* was already in use when he published his book (1843) (see Schäffner, *Entwicklung des internationalen Privatrechtes*, Frankfurt, 1841).

In the Scottish universities the German title of "International Private Law" has been adopted in the place of Private International Law.

On the whole, the divisions of Prof. Weiss seem to be the most convenient. As, however, we have treated Nationality and the position of foreigners under separate titles (see the articles ALIEN; ALIENAGE; BRITISH SUBJECT; NATIONALITY, etc.), the present article will deal with matters which may properly be comprised under conflict of laws.

2. HISTORICAL.

Private International Law, as it presents itself at the present day, is of modern derivation. It is even doubtful whether we need follow different authors back to the system of personality of the law which succeeded the break-up of the Roman Empire. With the development of territorial sovereignty, the place of birth ceased to determine the personal law, and the territorial law was applied to all persons resident within the area of its jurisdiction. Conflicts of local customs and laws necessarily occurred in countries where every province—nearly every town—was governed by a different charter or custom. Rules were doubtless followed in dealing with these conflicts, and though they arose between customs affecting persons owning the same allegiance, from them probably descend the contemporary rules applicable between laws affecting persons owning a different allegiance.

Thus the countries where conflicts of law were first studied as a branch of law seem to have been just such as Holland and Germany,

composed of communities which, though governed under different laws, have been united by the force either of law or of sentiment into something like one State or Confederacy (Dicey, *Conflict of Laws*, p. 7). The maxims adopted in England for their solution were derived from those which prevailed on the Continent, the earliest channel through which they filtered into our insular system being the ecclesiastical and admiralty Courts, "which professedly administered laws of more than insular extension" (Westlake, *Private International Law*, 4th ed., 1905, p. 8).

The whole branch of the law in question is estimated by Professor Dicey to have come into existence in England within little more than a century. "Even now it is far more often tacitly assumed than expressly acknowledged as the foundation of judicial decisions" (*Conflict of Laws*, p. 24).

"Extra-territorial recognition of rights," to use an expression suggested by Professor Holland (*Jurisprudence*, 10th ed., 1908, p. 411), has nevertheless now unquestionably become admitted as within the power of the English Courts, and it is in practice applied.

"I confess," said Lord Halsbury (*In re Missouri Steamship Co.*, 1889, 42 Ch. D. (C. A.) 321), "I have been somewhat surprised at the lengthy elaboration of principles which I should have thought by this time had been so far accepted as part of the English law, that it was not necessary to enter into so elaborate a consideration of them. That one country will, under some circumstances, enforce contracts made in another is a proposition I should have thought not requiring authority."

3. RULES OF, AND THEIR GENERAL APPLICATION.

Story sums up the general maxims which govern cases of conflict of laws as follows:—

1. The first and most general maxim or proposition is that every nation possesses an exclusive sovereignty and jurisdiction within its own territory.

As a natural consequence of the above—

2. No State or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others.

From these two maxims or propositions flows a third:—

3. That whatever force and obligation the laws of one country have in another, depends solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent (*Conflict of Laws*, pp. 28-33).

As regards the third of these propositions, the Courts of England never in strictness enforce foreign laws; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws (Dicey, *Conflict of Laws*, p. 10). Professor Dicey enunciates this principle in the following form:—Any right which has been duly acquired under the law of any civilised country is recognised, and in general enforced by the English Courts, and no right which has not been duly acquired is enforced or in general recognised by English Courts (*Conflict of Laws*, p. 22).

The same writer reduces the rules among which selection may be made of the law under which the right has been acquired to five, viz.:—

1. *Lex personalis*, or "the law of the country to which a person belongs either—(a) by domicile (*lex domicilii*); or (b) by nationality (*lex ligeantiae*);"

2. *Lex actus*, or "the law of the country where a legal act takes place," of which the *lex loci contractus*, or the law of the place where a contract is made, is a subdivision;

3. *Lex loci delicti*, or "the law of the country where a wrong is committed;"

4. *Lex loci solutionis*, or "the law of the country where a legal act (payment) is to be performed;" and

5. *Lex fori*, or "the law of the country to which the Court belongs in which an action is brought or other legal proceeding (e.g. administration in bankruptcy) takes place" (*cp. Holland, Jurisprudence*, 10th ed., p. 403).

Professor Westlake further distinguishes between matters which are subject to a particular national jurisdiction and matters in which all the claims should be adjudicated upon together. The first are where the subject of the action, if a thing, is situate, if a contract, was made, if a delict, was committed, within the territory. To these apply the *forum situs* or *rei sitae*, *contractus*, *delicti*, the two latter of which are classed together as the *forum speciale obligationis*. To the second applies the *forum concursus*; or that to which the defendant is personally subject, the *forum rei* (*Private International Law*, 4th ed., 1905, pp. 5, 6).

The English Courts in determining whether a case falls within the one or the other of these rules, enjoy a wider range of sources to which they may look for guidance than in ordinary domestic litigation. They must, of course, first ascertain whether it falls within the terms of any Act of Parliament. If it does not, the next inquiry is whether it is covered by any principle to which precedent has given the authority of law. If it fall neither within the terms of any Act of Parliament nor under any principle established by authority, the judge looks for guidance to foreign decisions, to the opinions of jurists, or to arguments drawn from general principles (Dicey, *Conflict of Laws*, p. 21).

"Whenever, as often happens," adds Professor Dicey, "neither the Statute Book nor the Reports contain any authoritative direction for the decision of a particular case, or rather of a particular class of cases, an intelligent inquirer must recur to the judgments of foreign Courts, and especially of American tribunals, and to the doctrine of authors such as Story or Savigny, whose decisions have, in fact, moulded the decisions of English judges. Such reference is justified not by the fictitious authority of any common law of Europe, but by the consideration that English judges, when acting in a legislative capacity, rightly give weight to the opinion of eminent jurists, and are influenced by the wish to make the practice of our Courts correspond in a matter which concerns all civilised States, with the practice upheld by foreign tribunals" (*Conflict of Laws*, p. 20).

4. SPECIAL APPLICATION OF RULES.

(a) *Status and Capacity*.—The status of a person is his general legal capacity to acquire and exercise rights.

"There are certain rights and duties," says Austin, "with certain capacities and incapacities to take rights and incur duties by which persons as subjects of law are variously determined to certain classes

The rights, duties, capacities, or incapacities which determine a given person to any of these classes constitute a condition or status which the person occupies or with which the person is invested" (*Jurisprudence*, 2nd ed., 1861, p. 70).

The chief varieties of status among natural persons may be referred to the following causes:—(1) Sex; (2) minority; (3) "*patria potestas*" and "*manus*;" (4) coverture; (5) celibacy; (6) mental defect; (7) bodily defect; (8) rank, caste, and official position; (9) race and colour; (10) slavery; (11) profession; (12) civil death; (13) illegitimacy; (14) heresy; (15) foreign nationality; (16) hostile nationality. All the facts included in this list, which we borrow from Professor Holland, have been held at one time or another to differentiate the legal positions of persons affected by them from that of persons of the normal type (*Jurisprudence*, 10th ed., 1906, p. 340).

To determine by which of different laws these varieties of status shall be governed, two criterions or systems still exist. The older one refers status to the law of the domicile of the person involved, and the more modern one makes it dependent upon his nationality. The latter tends to prevail. For instance, article 7 of the German Civil Code, which came into operation in 1900 [provides that the capacity of a person is to be judged according to the laws of the State to which he belongs. Thus, Germany followed France and Italy in substituting nationality for domicile as the criterion of personal law, though with express limitations intended for the security of transactions entered into in Germany, and while doing so has provided for the conflict of rules of private international law (Westlake, *Private International Law*, 4th ed., 1905, p. 34)]. "Whether our Courts," says Professor Dicey, "have on this subject adopted any one invariable principle may be doubted; but they have of recent years gone so far as to hold that an individual's legal condition is in many cases liable to be affected by the law of his domicile, and perhaps they may be said to have adopted in a very general way the rule that status depends *prima facie* on domicile; but in practice this principle is subjected to limitations and exceptions, which often go near to invalidating it" (*Conflict of Laws*, p. 475).

Lord Watson in his judgment in *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431-437, asserted that it is a settled rule of English law that civil status, with its attendant rights and disabilities, depends not upon nationality, but upon domicile alone.

For a full and recent discussion of the question of domicile and nationality as the basis of a personal law, see Westlake, *Private International Law*, 4th ed., 1905, chap. ii., *Domicile and Nationality—Renvoi*; see also *Law Quarterly Review*, 1908, vol. xxiv. pp. 133-146.

It seems certain that the law of England will not recognise a foreign status unknown to English Law (see *Hyde v. Hyde*, 1866, L. R., 1 P. & D. 130; *Blythe v. Ayers*, 96 Cal. 532; 31 Par. 915; *Re Bethell*, 1888, 38 Ch. D. 220); but that where the transaction takes place wholly within the country where the person is domiciled, a status under the law of his domicile will be recognised in England (Dicey, *Conflict of Laws*, p. 477).

"If," says Professor Dicey, "our English Court undertakes to determine the effect of acts done and rights exercised in a foreign country where a person is domiciled, the Court will recognise the effect of his status under the law of his domicile, without any reference to what would have been the status of such a person in England, or to what

might or might not be the effect of his foreign status on transactions taking place in any other country than that of his domicile" (*ibid.*, p. 478).

But again, observes Mr. Nelson, quoting Professor Dicey: "The tendency (more particularly observable in matters of contract) to refer some matters which would seem in strictness dependent on status to the *lex loci actus* occasionally operates as a practical refusal to give effect to the general principle." The subject is, however, as Mr. Nelson points out, best studied in its particular applications (Nelson, *Private International Law*, p. 66).

Professor Dicey cites, among his examples, that English law will recognise the law of Spain, under which the property of a person who becomes a monk devolves on his heir (cp. *Santos v. Illidge*, 1860, L. J. C. P. 348; 8 C. B. (N. S.) Ex. Ch. 861).

(b) *Status of Foreign Corporations*.—The recognition of the right of foreign corporations to carry on business in England, and to sue and be sued in their corporate capacity before English Courts, is a matter of daily experience, and has now passed unquestioned for so long that it may be considered to be established (see Dicey, *Conflict of Laws*, p. 485; Westlake, *Private International Law*, 4th ed., 1905, p. 362; [see also *Dutch West India Co. v. Henriques*, 1724, Stra. 612; 1728, *ibid.* 807; 1730, *ibid.* 808; *Newby v. Van Oppen and Colt's Patent Firearms Manufacturing Co.*, 1872, L. R. 7 Q. B. 293]). Their capacity is, of course, limited by English law, where the latter forbids any act which is not permitted to British corporations. Thus they must conform to the restrictions of the Mortmain Act, 1888, 51 & 52 Vict. c. 42, on the acquisition of land in perpetuity.

As regards the personal liability of members of a foreign company, Lord Lindley observed, that if a company is incorporated by a foreign Government, so that by the constitution of the company the members are rendered wholly irresponsible, or only to a limited extent responsible for the debts and engagements of the company, the liability of the members will be the same as in the country which created the corporation (Lindley, *Company Law*, 5th ed., p. 913. See also *General Steam Navigation Co. v. Gillon*, 1843, 11 Mee. & W. 877; [*Bateman v. Service*, 1881, 6 App. Cas. 386; *Risdon Iron and Locomotive Works v. Furness*, [1905] 1 K. B. 304]).

Conventions have been concluded between Great Britain and France and Belgium (1862) and Spain (1883) to insure recognition of British commercial companies in these countries similar to that which obtains in England for companies of foreign origin. As regards the Convention with France, see *Law Quarterly Review*, October 1897; Barclay, *British Companies in France*. See, for Italy, Declaration with Great Britain, dated November 26, 1867 (*Lond. Gaz.*, December 10, 1867, 6763); for Austria, Decree as to Foreign Companies (*Lond. Gaz.*, January 16, 1866, 261); for Germany, Declaration contained in Parliamentary Paper, 1874 [C. 942]; and for Mexico, Rules for the Protection of Commercial Associations of Mixed Nationality (*Lond. Gaz.*, April 25, 1854, 1294).

It is a question whether a foreign commercial company exercising "all its rights" under a convention with Great Britain is placed in the same position as a British limited company. The sense of the words "exercise all their rights" is not clear, but if they mean anything, it is

that the foreign company is not required to go through the formalities of formation in England in order to be admitted to legal personality. A British limited company, under the Companies Act, 1862 (s. 18), can hold land. Any other company falls within the provisions of the Mortmain Act, 1888. Must a foreign commercial company, entitled to "exercise all its rights" in England, obtain a licence to hold land under sec. 1 of the above Act? We believe there has hitherto been no decision or authoritative statement on this subject.

(c) *Form of Documents*.—"The true theory of the subject," says Phillimore, "would seem to require that the *form* of the contract should be regulated by the law of the place of its fulfilment or execution. But as in practice it often happens that the place of fulfilment is far removed from the place of the origin of the contract—as it may be difficult to know, and even impossible to follow, the forms prescribed by the law of the place of fulfilment in the place of origin—the general usage of States, increasing in force ever since the sixteenth century, has almost universally adopted the rule which is expressed by the phrase *locus regit actum*" (*International Law*, vol. iv. 454. *Cp.* Story, *Conflict of Laws*, ss. 260, 261).

Among these States England may be included, as regards all acts of obligation or contract. "No act of this kind in a foreign country," to quote Phillimore again, "is holden valid by the tribunals of either of these States (England and the United States) unless executed according to the formalities prescribed by the law of that foreign country. Indeed, the maxim is considered by these tribunals to apply not only to the external form, but to the internal substance of the act of obligation. And this may be the reason why the distinction between the application of the rule to the form and to the substance is not very clearly taken in Story's elaborate work" (vol. iv. p. 466).

So much is this so, that the subject forms part in English text-books of the private international law of contracts generally (see *infra*).

As regards wills, the application of the maxim *locus regit actum* has been specially enacted by the statute known as Lord Kingsdown's Act, 1861, 24 & 25 Vict. c. 114, sec. 1 of which provides that every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made *according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of His Majesty's dominions where he had his domicile of origin*.

(d) *Contract*.—The law governing obligations arising out of contract is that of the country where the contract is made, the *lex loci contractus*; but in English law this also often means the law by which the parties who make a contract intend it to be governed (Dicey, *Conflict of Laws*, p. 74). These in fact generally coincide, but they do not necessarily do so (*ibid.*).

Thus, where a contract, entered into in England between a Scottish distiller and a merchant in London, to be performed in Scotland, contained an arbitration clause for reference to two members of the London Corn

Exchange or their umpire, it was held that the parties intended that their rights should be interpreted, as to the arbitration clause, according to the law of England, and not that of Scotland (*Hamlyn & Co. v. Talisker Distillery*, [1894] App. Cas. H. L. Sc. 202; [see also *Spurrier v. La Cloche*, [1902] A. C. 446; *Royal Exchange Assurance Corporation v. Sjöforsalrings Atkiebolaget Vega*, [1902] 2 K. B. 384; *Hausen v. Dixon*, 1907, 96 L. T. 32]).

In *Lloyd v. Guibert*, 1865, L. J. 35 (N. S.) 74, Mr. Justice Willes observed that: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property, situate in another country, and so forth."

In *Chamberlain v. Napier*, 1880, 15 Ch. D. 614, it was held that, notwithstanding the general rule that the construction of a contract regarding personal estate is to be determined by the *lex loci contractus*, yet, in accordance with the manifest intention of the parties, as evidenced by the form of the instrument, the marriage contract must (so far as the husband's property was concerned) be construed according to English law. In this case two trusts had been created, the one in Scottish and the other in English form. Hall, V.-C., concluded, from the fact that the two sets of trusts were not framed in the same way, that they were meant to be different.

Real or immovable property is in all respects governed by the law of the country of its situation (*lex situs*). This includes the forms of conveying such property (Westlake, *Private International Law*, [4th ed., 1905, p. 203; see also *Adams v. Clutterbuck*, 1883, 10 Q. B. D. 403]).

Money produced by sale or otherwise from immovables would, in their *situs*, be considered to represent the immovables, and be subject to the same rights. It must be considered to represent them, and be subject to the *lex situs* in every jurisdiction in which it may happen to become administrable [(see *In re James Rea*, [1902] 1 Ir. Rep. 451)].

As regards successions, see *infra*.

The *lex loci contractus* does not, however, apply where an Act of Parliament has otherwise disposed, as in the case of the Foreign Marriage Act, 1892 (see *infra*). Nor is a contract valid, though in accordance with the law of the place where it is made, if it is invalid by English law or contrary to any "stringent domestic policy" in England [(see *Moulis v. Owen*, 1907, 1 K. B. 746)]. Thus evidence by writing must be furnished where required by sec. 4 of the Statute of Frauds, though the *lex loci contractus* does not require it (*Leroux v. Brown*, 1852, 12 C. B. 801; see Westlake, *Private International Law*, 4th ed., 1905, p. 272; see also Dicey, *Conflict of Laws*, pp. 541-543).

As regards interpretation, the following rule was laid down by Lord Cranworth in *Di Sora v. Philipps*, 1863, 10 H. L. 633:—Where a written contract is made in a foreign country, and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art, if it contains any; thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any particular rules of construction, if any such rules exist, by the foreign law. With this assistance, the Court must interpret the contract itself on ordinary principles of construction.

But, in fact, there seems to be no precise principle to follow as regards construction. As Professor Westlake truly observes, it would be a bold undertaking to frame any concise rule for the selection of a law upon interpretation (*Private International Law*, 4th ed., 1905, pp. 275-6).

See as to the rules which regulate a conflict of laws in the case of negotiable instruments, the article *BILLS OF EXCHANGE*, *ante*, Vol. II. p. 215.

(e) *Realty (Immovables)*.—"No general rule," says Professor Westlake, "can be laid down for the construction of contracts, wills, or other dispositions concerning immovables. A stringent rule of construction existing by the *lex situs* of the immovables concerned, will of course prevent any instrument from affecting the immovables except in accordance with it, but otherwise a reasonable regard must be had to all the circumstances, including the *locus contractus* or *actus*, and the national character or domicile of the parties, testator or other disponent" (*Private International Law*, 4th ed., 1905, p. 209).

This, however, may be said, that immovables are governed by the law of their situation irrespectively of the domicile of the testator or intestate, and that this applies both to the testamentary capacity of a testator and to the forms and solemnities requisite to give effect to his will (see *Coppin v. Coppin*, 1725, 2 P. Wms. 291; *Orrell v. Orrell*, 1871, L. R. 6 Ch. 302; *Boyse v. Coldclough*, 1854, 24 L. J. Ch. 7).

English real estate descends on intestacy, according to English law, whatever may have been the personal law of the intestate (Westlake, [*Private International Law*, 4th ed., 1905, p. 207; *Birtwhistle v. Vardill*, 1830, 2 Cl. & F. 571]). The effect of marriage on rights over (see *Harrison v. Harrison*, L. R. 8 Ch. 342; [see also *De Nicols v. Curlier*, [1900] 2 Ch. 410]; and Dicey, *Conflict of Laws*, p. 519), and all questions concerning a restraint on the alienation or disposition of, such estate are also to be decided by English law (Westlake, [*Private International Law*, 4th ed., 1905, p. 206]). See Dicey, *Conflict of Laws*, p. 524, as to certain immovables which in the United Kingdom form part of the personal estate, and *ibid.*, pp. 65 and 72, as to the distinction between realty and immovables.

(f) *Successions to Personal Estate (Movables)*.—The universal doctrine now recognised by the common law, although formerly much contested, is that the succession to personal property is governed exclusively by the law of the actual domicile (*q.v.*) of the intestate at the time of his death (Story, *Conflict of Laws*, 1846 ed., s. 481).

This law decides who are the persons entitled in distribution, and in what degree of preference, if any, they are so entitled (Phillimore, *International Law*, 1861 ed., iv. p. 634).

But whatever the domicile (or political nationality) of the deceased, his personal property, wherever situated, cannot be lawfully possessed, or if recoverable in England, cannot be sued for, without an English grant of probate and administration (Westlake, *Private International Law*, 4th ed., 1905, p. 105; [see also *New York Brewers Co. v. A.-G.*, 1899, A. C. 62]). As regards the foreign persons to whom such grants should be made, Lord Penzance, in *In re Hill*, 1870, L. R. 2 P. & M. 90, said: "I have before acted on the general principle that where the Court of the country of the domicile of the deceased makes a grant to a party, who then comes to this Court and satisfies it that by the proper authority of

his own country he has been authorised to administer the estate of the deceased, I ought without further consideration to grant power to that person to administer the English assets."

Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid in England, and conversely any will of movables which is invalid according to the law of the testator's domicile at the time of his death on account of (a) the testamentary incapacity of the testator, or (b) the want of the formalities required by such law, or (c) its provisions being contrary to such law, is invalid (Dicey, *Conflict of Law*, pp. 684 and 686).

This, however, is subject to the following exceptions under the Wills Act, 1861, 24 & 25 Vict. c. 114:—

Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the laws then in force in that part of His Majesty's dominions where he had his domicile of origin.

Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

(g) *Husband and Wife*.—As to the rules of private international law relating to Marriage and Divorce, see the articles FOREIGN MARRIAGE; FOREIGN DIVORCE; [see also *Gillig v. Gillig*, [1906] P. 135; *Bater v. Bater*, [1906] P. 209; *Ogden v. Ogden*, [1907] P. 107].

The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England (Dicey, *Conflict of Laws*, p. 490).

The effect of marriage on English land, in the absence of express contract, is governed by the law of England without reference either to the domicile of the parties or to the place of celebration (*loci celebrationis*) of the marriage (Westlake, [*Private International Law*, 4th ed., 1905, p. 70; see also *Welch v. Tennant*, [1891] A. C., at p. 645, *per* Lord Herschell, L.C.; *Re Martin*, *Loustalan v. Loustalan*, 1900, P. 239; *De Nicols v. Curlier*, [1900] A. C. 21]). See *Realty*, *supra*.

Where there is no marriage contract or settlement, the mutual rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the husband's domicile at the time of the marriage, without reference to the law of the country where the marriage is celebrated or where the wife is domiciled before marriage (Dicey, *Conflict of Laws*, pp. 648, 649).

The domicile of the husband at the date of the marriage, with the possible exception of another domicile which may have been acquired

after the marriage in pursuance of an agreement to that effect made before it, is called the matrimonial domicile (see Westlake, *Private International Law*, 4th ed., 1905, p. 71).

A marriage contract or settlement, in the absence of reason to the contrary, is construed according to the law of the matrimonial domicile (see Dicey, *Conflict of Laws*, 653; and *Duncan v. Cannon*, 1854, 18 Beav. 128; 23 L. J. Ch. 268; *Byam v. Byam*, 1854, 19 Beav. 58; *Colliss v. Hector*, 1875, L. R. 19 Eq. 334; *Anstruther v. Adair*, 1834, 2 Myl. & K. 513; *Chamberlain v. Napier*, 1880, 15 Ch. D. 614).

On the other hand, it is admitted in principle that the succession to either consort on death must be separated from the effect of marriage on property, and be regulated by the law of the last domicile of the deceased (Westlake, *Private International Law*, 4th ed., 1905, p. 81).

As regards the formal requisites of a marriage settlement or contract, they are generally governed by the law of the place where it is made (see *supra*, *Form of Documents*, and Westlake, *ibid.*, p. 75). But the English Courts do not enforce the *lex loci actus* rigorously. Thus in *Van Grutten v. Digby*, 1862, 31 Beav. 561; L. J. N. S. 32, p. 179, where the deed in English form was executed in France, the judge (Romilly, M.R.) said: "I hold it to be the law of this country that if a foreigner and Englishwoman make an express contract previous to marriage, and if, on the faith of that contract, the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then and in that case this Court will administer the law on the subject as if the whole matter were to be regulated by English law." [See also *Viditz v. O'Hagan*, [1899] 2 Ch. 569; *In re Bankes*, *Reynolds v. Ellis*, [1902] 2 Ch. 333; *In re Fitzgerald*, *Surman v. Fitzgerald*, [1904] 1 Ch. 573.]

(h) *Guardianship*.—A foreign guardian has, strictly speaking, no authority over his ward in England (*Johnstone v. Beattie*, 1843, 10 Cl. & Fin. 42; *Dawson v. Jay*, 1854, 3 De G., M. & G. 764; cp. *Ewing and Others v. Orr-Ewing*, 1883, 9 App. Cas. 34 H. L. (E.); *Ewing v. Orr-Ewing*, 1885, 10 App. Cas. 454 H. L. (Sc.)), except such as could be exercised by an English guardian (see *Johnstone v. Beattie*, 1843, 10 Cl. & F., at p. 114, *per* Cottenham, L.C.). The Court will not, from any supposed benefit to infant subjects of a foreign country who have been sent to the United Kingdom for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove them from England in order to complete their education in their own country. But the Court refused to discharge an order by which guardians had been appointed over the children in this country; and merely reserved to the foreign guardian the exclusive custody of the children to which he was entitled by the order of the Court of his own country (*Nugent v. Vetzera*, 2 Eq. 704; [see also *Stuart v. Bute*, 1861, 9 H. L. C. 440; 11 E. R. 799; *In re Burbridge*, [1902] 1 Ch. 426]).

A foreign guardian, therefore, if he wishes to exercise his powers in England, whether over his ward's person or property, should get himself appointed guardian by the English Courts. See the article *INFANTS* (*Foreign Guardian*), *ante*, Vol. VII. p. 168.

(i) *Lunacy*.—No English jurisdiction in lunacy can be applied to any person unless under the authority of the English Court, which has

an absolute discretion to grant or refuse any application made to it. See the articles CURATOR BONIS; LUNACY; see also *In re Garnier*, 1872, L. R. 13 Eq. 532; *In re A. M. Knight*, [1898] 1 Ch. 257; [*In re Chatard's Settlement*, [1899] 1 Ch. 712; *New York Security and Trust Co. v. Keyser*, [1901] 1 Ch. 666].

In a case under the Lunacy Regulation Act, 1853 (now repealed and superseded by the Lunacy Act, 1890), on it being proposed to appoint as committee a person resident out of the jurisdiction, the Master in Lunacy reported that, as the proposed committee was resident out of the jurisdiction, he could not approve of him, and the Court, though satisfied of the expediency of appointing him, declined to do so until the Master had certified that the proposed committee was a person whom, if resident within the jurisdiction, he would have approved (*In re Bruère*, 1881, 17 Ch. D. 775).

It seems doubtful, observes Mr. Nelson, whether "a foreign committee of the person has, in that character only, any authority in respect of a lunatic's person here (*Sylva v. Da Costa*, 1803, 8 Ves. 316; *In re Houstoun*, 1826, 1 Russ. 312). If it is rendered necessary by circumstances, the proper proceedings should be taken here; and, at any rate when the property here is small and movable, the Court, on the person being found lunatic, will order that he be delivered into the custody of a properly appointed foreign committee or guardian" (*In re Sottomaior*, 1874, L. R. 9 Ch. 677; *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42; 8 E. R. 657; 59 R. R. 23; *Ex parte Child*, 15 C. B. 238).

(j) *Copyright*.—See the articles BERNE CONVENTION; COPYRIGHT (*International Copyright*).

(k) *Ships*.—A British ship as an article of purchase and sale, and so long as private law applies to her, is a movable, though on the high seas and as a subject of public law she is assimilated for most purposes to British territory. The Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, provides that: "Where, in any matter relating to a ship or to a person belonging to a ship, there appears to be a conflict of laws, then if there is (in Part II. of the Act) any provision on the subject, which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case is to be governed by the law of the port at which the ship is registered" (s. 265).

It has also been decided that where the contract of affreightment does not provide otherwise, as between the parties to a contract, in respect of sea-damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves. In the important case of *Lloyd v. Guibert*, the plaintiff, a British subject, chartered a French ship belonging to French owners, at a Danish West India port, for a voyage from St. Marc in Hayti, to Havre, London, or Liverpool, at charterer's option. The charter-party was entered into by the master in pursuance of his general authority as master. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained sea-damage and put into Fayal, a Portuguese port, for repair. There the master properly borrowed money on bottomry of ship freight, and cargo, and repaired the ship, and she completed her voyage to Liverpool. The bondholder proceeded in the Court of Admiralty against the ship,

freight, and cargo. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the plaintiff as owner of the cargo, for which he sought indemnity against the defendants, the French shipowners. The defendants gave up the ship and freight to the shipper, so that by the alleged law of France the abandonment absolved them from all further liability on the contract of the master. It was held that the parties must be taken to have submitted themselves, when making the charter-party, to the French law as the law of the ship, and therefore that, assuming the law of France to be as alleged, the plaintiff's claim was absolutely barred (1865, L. R. 1 Q. B. 115).

[The construction of the contract of affreightment, the incidental rights, and the validity of the stipulations in the contract are regulated by the law of the flag (see *In re Missouri Steamship Co.*, 1888, 42 Ch. D., at p. 327, *per* Chitty, J.; see also Westlake, *Private International Law*, 4th ed., 1905, pp. 285-287).]

The law of the flag is sometimes referred to in text-books and decisions as meaning the law of the country whose flag a ship carries. When the flag carried by a ship is that of a State including more than one country, the law of the flag means (*semble*), says Professor Dicey, the law of the country where the ship is registered (*Conflict of Laws*, p. 589).

Nevertheless, the country to which a ship, in fact, belongs is ultimately fixed by the nationality of her owner, and circumstances may exist under which a ship, for some purposes at any rate, belongs to a country of which she does not carry the flag (see *Chartered Bank of India v. Netherlands Co.*, 1883, 10 Q. B. D. [C. A.] 521). See the articles EXTERRITORIALITY; FOREIGN SHIP.

(l) *Collisions*.—See the article COLLISIONS AT SEA (*Law Applicable to Collisions*), *ante*, Vol. III. p. 148; [see also *The Jassy*, [1906] P. 270].

(m) *Bankruptcy*.—See the article BANKRUPTCY, *ante*, Vol. II. pp. 13, 49. The recognition of a foreign bankruptcy is in England dependent upon its having been declared in the country of the bankrupt's domicile. Thus the persons (trustees, syndics, or others) who under the law of the bankrupt's domicile are appointed to administer his estate, are entitled to any personal property he may have in England. [See *Solomons v. Ross*, 1764, 1 H. Bl. n.; *In re Blithman*, 1866, L. R. 2 Eq. 23; *In re Hayward*, [1897] 1 Ch. 905.]

But no assignment of a bankrupt's property under the bankruptcy law of a foreign country, unless the bankruptcy takes place, as does a Scotch or Irish bankruptcy, under an Act of the Imperial Parliament operates as an assignment of the bankrupt's immovables, *e.g.* lands or houses in England, or, indeed, has any effect upon the title to them (Dicey, *Conflict of Laws*, p. 443).

Where the bankruptcy has been declared in a foreign country in which the bankrupt is not domiciled, *semble*, it does not affect the personal property of the bankrupt in England. Thus a firm having its head offices in Paris, and a branch establishment in England, was declared bankrupt in Paris under the law of France, and a syndic was appointed to administer the estate. Subsequently a bankruptcy petition was presented against them in England, and an order was made appointing an interim receiver. The syndic applied to the Court to discharge this order, and to stay all further proceedings under the petition. There

was no evidence as to the domicile of the members of the firm, but two of them resided in England, where the firm had large assets. The registrar refused the application. On appeal it was held that there being assets within the jurisdiction, the receiving order was rightly made, and that the fact that a prior bankruptcy had been commenced in a foreign country, not shown to be the country of and domicile of the debtors, was no ground for staying the proceedings in this country (*In re Artola Hermanos, Ex parte Chale*, 1890, 24 Q. B. D. 640).

In general, however, the administration in bankruptcy of the property of a bankrupt which has passed to the trustee is governed by the law of the country where the bankruptcy proceedings take place, on the principle that all matters of procedure are governed by the *lex fori* (see *infra*; Dicey, *Conflict of Laws*, p. 671).

As regards the effect of a foreign bankruptcy on the obligations of the bankrupt, it has been held that a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country, though one in which he is domiciled (*Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux*, 1890, 25 Q. B. D. 399).

(n) *Jurisdiction*, see *supra*, *Rules of, and their General Application*. As regards ambassadors and diplomatic agents, see the article DIPLOMATIC AGENTS; and as to the position of a sovereign, see the article EXTERRITORIALITY.

(o) *Procedure, Evidence, Foreign Judgments*.—Procedure is entirely governed by the *lex fori* or law of the country to which the Court in which the proceedings are taken belongs. As to evidence, see the article COMMISSION, EVIDENCE ON, Vol. III. p. 207 (subs. *In Foreign Countries*).

The manner of proving the facts as belonging to procedure depends on the *lex fori* (*The Gatano*, 1882, 7 P. D. 137, 144; *Bain v. Whitehaven Rly. Co.*, 1850, 3 H. L. 1, 19; *Yates v. Thomson*, 1835, 3 Cl. & Fin. 544; *Brown v. Thornton*, 1837, 6 L. J. (N. S.) K. B. 82). See the article FOREIGN JUDGMENTS.

(p) *Limitation of Actions*.—The two principal rules as to limitation are thus laid down by Professor Westlake [(*Private International Law*, 4th ed., 1905, pp. 302, 303)]:—

(1) An obligation cannot be enforced in England after it has been barred by the English Statute of Limitations, notwithstanding that it has not been barred according to its proper law [(see *British Linen Co. v. Drummond*, 1830, 10 B. & C. 903; *Pardo v. Bingham*, 1869, L. R. 4 Ch. App. 735)].

(2) An action can be brought in England on a contract or tort so long as an obligation resulting from such contract or tort would not have been barred by the English Statute of Limitations, notwithstanding that the obligation, which, in fact, resulted from it, has been barred according to its proper law, *lex loci contractus* or *solutionis* or *lex loci delicti commissi* [(see *Harris v. Quine*, 1869, L. R. 4 Q. B. 653; *Alliance Bank of Simla v. Carey*, 1880, 5 C. P. D. 429)].

Professor Dicey classes limitation of actions or other proceedings under procedure as governed by the *lex fori*. [As to the distinction

between prescription and limitation, see Dicey, *Conflict of Laws*, pp. 518, 522.]

(g) *Torts*.—In *The Chartered Bank of India v. The Netherlands India Steam Navigation Co.*, 1883, 10 Q. B. D. 521, Brett, L.J. (at pp. 536, 537), held that in respect of any tort committed in a foreign country within its own exclusive jurisdiction an action for tort cannot be maintained in this country, unless the cause of action would be a cause of action in that country, and also would be a cause of action in this country. Both must combine if the tort alleged was committed within the exclusive jurisdiction of a foreign country.

Thus not only is an action not maintainable in this country upon a wrong committed abroad which is not actionable by the law of England (*The Halley*, 1868, L. R. 2 P. C. 193; and see *Hart v. Gumpach*, 1873, L. R. 4 P. C. 439), but also no action can be maintained here if the alleged cause of action was justifiable by the law of the place where it was done (*Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225, 239, and 1870, L. R. 6 Q. B. 1, 29; *Dobree v. Napier*, 1836, 5 L. J. (N. S.) C. P. 273; *The M. Moxham*, 1876, 1 P. D. 107; [*Machado v. Fontes*, [1897] 2 Q. B. 231; *Carr v. Francis Times & Co.*, [1902] A. C. 176]).

It was formerly supposed that if the remedy provided by the *lex loci* was purely penal and penal only, it would seem that no action can be maintained in this country, although the act complained of would be tortious if done here (*Phillips v. Eyre*; *Chartered Bank of India v. Netherlands Co.*). [It has now, however, been expressly decided that an action is maintainable here, provided that the act was wrongful according to the law of the place where it was committed, though it would not have supported an action for damages under the *lex loci delicti* (*Machado v. Fontes*, [1897] 2 Q. B. 231).]

(r) *Criminal Offences*.—"The common law," says Story, "considers crimes as altogether local, and cognisable and punishable exclusively in the country where they are committed. No other nation, therefore, has any right to punish them; or is under any obligation to take notice of, or to enforce any judgment rendered in such cases by the tribunals having authority to hold jurisdiction within the territory where they are committed" (Story, *Conflict of Laws*, p. 1013).

Crimes committed on a British ship on the high seas are deemed to have taken place on British territory (see *R. v. Lopes*, 1858, 27 L. J. M. C. 48; *R. v. Lesly*, 1860, 29 L. J. M. C. 97; *R. v. Peel*, 1862, 32 L. J. M. C. 65; *R. v. Armstrong*, 1875, 13 Cox C. C. 185; [*R. v. Carr*, 1882, 10 Q. B. D. 76]).

As regards offences committed in British TERRITORIAL WATERS (*q.v.*), see the Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73; see also the article FRANCONIA CASE.

Offences committed on board a British ship within the territorial waters of a foreign State seem to be subject to English law, reasoning *à fortiori* from the decision in *R. v. Anderson*, L. R. 1 C. C. 161. In this case it was held that the Admiralty jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below bridges where the tide ebbs and flows and where great ships go, and that all seamen, whatever their nationality, serving on board such British vessels, are amenable to the provisions of British law. The

facts were that an American citizen serving on board a British ship caused the death of another American citizen serving on board the same ship in circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges where the tide ebbed and flowed and great ships went. It was held that the prisoner was rightly tried and convicted in the Central Criminal Court.

There are statutory exceptions to the above-mentioned principle as to the territoriality of the law of England, as in the case of murder or manslaughter committed by a British subject "on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not" (the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, s. 9), and in the case of bigamy committed by a British subject by a second marriage entered into in "England or Ireland or elsewhere" (*ibid.*, s. 57).

It seems also that the offence of procuring money by false pretences may be committed by posting a letter from England addressed to a place out of England (see dictum of Coleridge, C.J., in *R. v. Holmes*, 1884, 12 Q. B. D. 23).

5. PROOF OF FOREIGN LAW.—See the article FOREIGN LAW.

6. PROJECTS TO ASSIMILATE PRIVATE INTERNATIONAL LAW.

Several attempts have in recent years been made to bring about the adoption by different Governments of homogeneous rules in relation to those matters which give rise to conflicts of private law. Chief among these was an official Conference which was held in 1893, at The Hague, at the instance of the Dutch Government. A second similar Conference was held in 1894, at which the following Governments were represented:—Austria-Hungary, Belgium, Germany, Denmark, France, Holland, Italy, Luxembourg, Portugal, Roumania, Russia, Spain, Sweden and Norway, and Switzerland. [A third official conference was held at The Hague in 1900.] The subjects of marriage, separation, divorce, guardianship, civil procedure, bankruptcy, successions, and wills were considered and a model code was adopted thereon. [As the result of these Conferences international Conventions on the subjects of procedure, marriage, divorce, and guardianship were held. Great Britain was not, however, a party to the Conferences or Conventions.]

Discussing, in 1905, the development of the subject of private international law, Professor Westlake said: "It would now be as idle as ever, perhaps even more so, to regard the subject as governed by maxims of universal acceptance, unless one were content with maxims too vague to be of much practical use. Nor does the prospect of arriving at a real international agreement on the subject by means of doctrinal writing seem at all more hopeful than at any previous time (*Private International Law*, 4th ed., p. 400).]

7. AUTHORITIES.

Asser and Rivier, *Elements de droit international privé, ou du conflit des lois*, Paris, 1884.

Bar, *Das Internationale Privat und Strafrecht*, Hanover, 1862; transl. into English by C. R. Gillespie (*Private International Law*), 2nd ed., Lond., 1892.

Brocher, *Nouveau traité de droit international privé*, Paris, 1876; *Cours de droit international privé suivant les principes consacrés par le droit positif français*, Paris, 1882-1885.

- Burge, *Commentaries on Colonial and Foreign Laws generally, and in their Conflict with each other and the Law of England*, Lond., 1838, 5 vols., 1907.
- Buscemi, *Corso di diritto internazionale privato*, Messina, 1872.
- Catalani, *Il diritto internazionale privato e i suoi recenti progressi*, Rome, Naples, and Turin, 1883.
- Dicey, *A Digest of the Law of England with reference to the Conflict of Laws*, with Notes of American Cases by J. Bassett Moore, Lond., 1896.
- Fiore, *Diritto internazionale privato*, Florence, 1896.
- Fœlix, *Traité du droit international privé*, Paris, 1843; 4th ed., 1866.
- Foot, *Private International Jurisprudence*, Lond., 1878, 3rd ed., 1904.
- Hamaker, *Aard en doel van het international privaatrecht*, Leyden, 1878.
- Holland, *Jurisprudence*, 10th ed., Oxford, 1906.
- Lainé, *Introduction au droit international privé*, Paris, 1892.
- Laurent, *Le droit civil international*, Paris, 1880-1882.
- Livermore, *Dissertations on the Questions which arise from the Contrariety of the Positive Law of Different States and Nations*, Lond., 1828.
- Lomonaco, *Trattato di diritto civile internazionale*, Naples, 1874.
- Nelson, *Private International Law* (Leading Cases), Lond., 1889.
- Pappafava, *Il diritto internazionale privato*, Zara, 1884.
- Pfeiffer, *Das Princip des internationalen privatrechts*, Tübingen, 1851.
- Phillimore, *Commentaries upon International Law*, 3rd ed., Lond., 1889, vol. iv.
- Rolin, *Principes de droit international privé*, Paris, 1897.
- Savigny, *System des heutigen römischen rechts* (8th vol.), Berlin, 1840; transl. of vol. viii., *Private International Law*, into English by Guthrie, Edinburgh, 1869; 2nd ed., 1880.
- Story, *Commentaries on the Conflict of Laws*, Boston, 1834; 7th ed., 1872.
- Vareilles-Sommières, *La synthèse du droit international privé*, Paris, 1897.
- Vincent-Penaud, *Dictionnaire de droit international privé*, Paris, 1888.
- Weiss, *Traité élémentaire de droit international privé*, Paris, 1886; *Traité théorique et pratique de droit international privé*, Paris, 1894.
- Westlake, *A Treatise on Private International Law*, Lond., 1858; 4th ed., 1905.
- Wharton, *Treatise on the Conflict of Law or Private International Law*, Philadelphia, 1872; 2nd ed., 1881.
- Journal du droit international privé et de la jurisprudence comparée*, published by Edouard Clunet.
- Revue de droit international et de législation comparée*, Brussels.

Private Letters.—The author of a letter has, at common law, a property in the literary composition so long as he keeps it to himself. But that property is lost by publication (*Macmillan v. Dent*, [1907] 1 Ch. 120). (As to what amounts to publication, see *Caird v. Sime*, 1887, lectures; cp. *Walter v. Lane*, [1900] A. C., speeches reported in newspaper.) A similar right of property exists in an unpublished picture, and it has been held that an action for damages will lie against an innocent person who has published a copy of the plaintiff's picture (*Mansell v. Valley Printing Co.*, [1908] 1 Ch. 567). This property is not lost by communication, though the property in the paper itself, the concrete thing, is in the addressee of a letter (*Pope v. Curl*, *Percival v. Phipps*, *infra*). The writer has other rights, independent of property which enable him to interfere with the unlimited use of the letter by the recipient (*Queensberry v. Shebbeare*, 1758, 2 Eden, 329; 28 E. R. 924; *Gee v. Pritchard*, *infra*; *Caird v. Sime*, 1887, 12 App. Cas. 326). The recipient may use it for any lawful purpose, but publication is not such a lawful purpose (*Hopkinson v. Lord Burghley*, 1867, L. R. 2 Ch. 447, cited by Buckley, L.J., in *Macmillan v. Dent*, [1907] 1 Ch. 129). But the copyright in a letter published after the death of a writer is vested, by the Copyright Act, 1842, in the proprietor of the letter itself (*Macmillan v. Dent*, *supra*). Copyright is commonly understood to signify the exclusive right of multiplying copies of a work, and is in this sense the creature of statute, and commences only with publication. But it may also be used to denote

the author's right to unpublished matter; and on this right, which is based upon the common law, the jurisdiction to restrain the publication of private letters is founded (*Jeffreys v. Boosey*, 1854, 4 H. L. C. 815, 867, 893, 919, 962; 10 E. R. 681; *Gee v. Pritchard*, 1818, 2 Swans. 402, 413; 36 E. R. 670; 19 R. R. 87). The right is in the writer, while living, and not in the receiver. The leading case is *Gee v. Pritchard*, in which Lord Eldon supported the doctrine laid down by Lord Hardwicke in *Pope v. Curl*, 1741, 2 Atk. 342; 26 E. R. 608: "Where a man writes a letter it is not in the nature of a gift to the receiver; it is only a special property in the receiver. Possibly the property of the paper may belong to him, but this does not give a licence to any person whatsoever to publish it to the world, for at most the receiver has only a joint property with the writer." This view has been approved in *Labouchere v. Hess*, 1898, 77 L. T. 559. The statement of Plummer, V.-C., in *Perceval v. Phipps*, 1813, 2 Ves. & Bea. 19; 35 E. R. 225; 13 R. R. 1, that the Court would not interfere to restrain the publication of commercial or friendly letters, except under special circumstances, on the ground that private letters, as a rule, had not the character of literary work, has been frequently cited in argument, but has not been supported by subsequent decisions.

The Court accordingly, without proceeding so far as to decree the restoration of letters (*Gee v. Pritchard*, *supra*), will restrain any person in the possession of letters from publishing them against the will of the writer, except under special circumstances (*Labouchere v. Hess*, *supra*). What would constitute such special circumstances it is difficult exactly to determine, but publication will not be restrained when necessary for the purposes of justice (*Hopkinson v. Lord Burghley*, 1867, L. R. 2 Ch. 447), or for the vindication of the receiver's character (*Labouchere v. Hess*; *Lytton v. Devey*, 1884, 54 L. J. Ch. 93; *Folsom v. Marsh*, 1841, 2 Story (Amer.) 100), or when the acts of the parties themselves may supply reasons (*Gee v. Pritchard*; *Perceval v. Phipps*; *Labouchere v. Hess*), or where the letters have been written on behalf of some other, for it has been held that a solicitor who wrote a letter to a shareholder apparently on behalf of a company has no such property in it as to prevent its publication, although he swears it was written in a private capacity (*Howard v. Gunn*, 1863, 32 Beav. 466; 55 E. R. 181).

The recipient of a letter may recover substantial damages, in an action of trover, for the conversion of a letter and publication of its contents (*Thurston v. Charles*, 1905, 21 T. L. R. 659).

[*Authorities*.—Copinger on *Copyright*, 4th ed., 1904; Story on *Equity Jurisprudence*, 13th ed., by Bigelow.]

Private Road.—A road not dedicated to the use of the public as a highway. Occupation roads made on an estate for the accommodation of the owners and occupiers on it are not dedicated to the public use, though where the proprietor covenanted that the owners and occupiers should have the full use and enjoyment of the roads as if they were public roads, it was held that a gas company could, on their requisition, break the soil of the road to lay down gas mains without the proprietor's consent (*Selby v. Crystal Palace Gas Co.*, 1862, 30 Beav. 606; 54 E. R. 1025; 4 De G., F. & J. 246; 45 E. R. 1178). And the mere user, though immemorial, of a private road for certain purposes, *e.g.* agricultural purposes, or for carrying materials to enlarge or rebuild farmhouses and cottages, does not establish a right of way

for all purposes when the condition of the property has been altered, *e.g.* for carting materials required for building a number of new houses on the land (*Wimbledon and Putney Commons Conservators v. Dixon*, 1875, 1 Ch. D. 362). See also as to varying uses of a private way *Abercromby v. Fermoy Town Commissioners*, [1900] 1 Ir. R. 302; *Attorney-General v. Esher Linoleum Co.*, [1901] 2 Ch. 647.

Where the public have a right of way along a lane privately owned, and the way is an irregular path bounded on each side by greensward, there is no presumption that all the land between the two fences is dedicated to the public (*Ford v. Harrow U. D. Council*, 1903, 1 L. G. R. 256).

The public have no right of way to visit a public monument on private land, and though a *cul-de-sac* (in this case terminating at such monument) may be a public highway, its dedication will not be presumed from mere public user without evidence of expenditure on the place in dispute for repairs, lighting, or other matters, by the public authority (*Attorney-General v. Antrobus*, [1905] 2 Ch. 189).

The remedy of injunction will not always be granted against trespassers on a private road, *e.g.* when owing to the state of the neighbourhood and sparseness of population no real injury results to the landowner (*Behrens v. Richards*, [1905] 2 Ch. 614).

It is important for any owner who does not intend to dedicate a private way to the use of the public, to preserve evidence of his intention, *e.g.* by a bar set up across the street; or the closing of a gate one day in the year; or a notice continually posted (*Barraclough v. Johnson*, 1838, 8 A. & E. 99; and Pratt on *Highways*, 1905 ed., p. 30). Where there is no direct evidence of the owner's intention an *animus dedicandi* may be presumed, either from public maintenance or public user without interruption. Presumption of dedication is a question of fact for a jury (Pratt, *ibid.*, p. 30). See also *Chinnock v. Hartley Wintney R. D. Council*, 1899, 63 J. P. 327, where it is pointed out that a single act of interruption on the part of an owner is more valuable evidence (as showing no intention to dedicate) than many acts of public user (*Piggott v. Goldstraw*, 1901, 84 L. T. 94; 65 J. P. 259).

A statutory body (*e.g.* a railway company possessing reservoirs, embankments, etc., for feeding a canal system) cannot dedicate to the public a right of way which would be incompatible with the special purposes for which the company was incorporated. In this case the public had long been accustomed to wander over the reservoir banks, etc. The company closed the paths and the district council pulled down the obstructions. The company proved that continued user by the public of the paths would probably break down the embankments and cause great public damage as a result. It was held that in the circumstances there was no dedication (*Great Western Rly. Co. v. Solihull R. D. Council*, 1902, 86 L. T. 852; 66 J. P. 772).

As to the substitution of a new for an old private road and the rights of lessees to use the old road, see *Smith v. Wilson*, [1903] 2 Ir. R. 45.

The presumption that the soil of a road *usque ad medium filum* belongs to the owner of the adjoining lands applies in the case of a private road as well as that of a public one; but it is necessary that there should be no evidence of user under a claim of ownership, as distinguished from user *quà* road (*Holmes v. Bellingham*, 1859, 7 C. B. N. S. 329). Apart from some special agreement, the grantee of a private road is not under

any obligation to repair it (*Duncan v. Louch*, 1845, 14 L. J. Q. B. 185); and no indictment will lie for the non-repair of such a road (*R. v. Richards*, 1800, 8 T. R. 634; 5 R. R. 489), nor can the liability be imposed on the parish (*R. v. Cottingham*, 1794, 6 T. R. 20; and see sec. 23 of the Highway Act, 1835, 5 & 6 Will. iv. c. 50). The owner of a private road is not bound to fence excavations, or otherwise protect the public from danger in using it (*Murley v. Grove*, 1882, 46 J. P. 360); and a surveyor is by sec. 57 of the Highway Act, 1835, liable to a penalty if he digs material for a highway in an occupation road. But the local authority may call on the owners or occupiers of private streets to pave, sewer, level, metal, etc., them, and light them properly, and if they do not do so, may execute the works and recover the cost (Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 150; see STREET). And a private road is a "street" within secs. 16 and 54 of the Public Health Act, 1875 (*Hill v. Wallasey Local Board*, [1894] 1 Ch. 133). Secs. 49 and 50 of the Railways Clauses Act, 1845, 8 Vict. c. 20, require the descent or ascent in a private carriage road passing under a railway, or a bridge carrying such a road over a railway, to be not more than 1 in 16 feet, unless a special Act otherwise provides (see RAILWAY). The rights of persons using a private way are not affected by its subsequent dedication to the public (*Duncan v. Louch*, *ubi supra*; *Brownlow v. Tomlinson*, 1840, 1 Man. & G. 484; and see *Wells v. London, Tilbury, and Southend Rly. Co.*, 1877, 5 Ch. D. 126). A valuer under the Inclosure Act, 1845, 8 & 9 Vict. c. 118, is (s. 68) to set such private or occupation roads and ways through the lands to be inclosed as he thinks fit; the expenses, unless he direct otherwise, being paid like the other expenses of the inclosure.

A lessee cannot dedicate a public right-of-way so as to affect the interests of the owner of the fee simple, or of those who purchase from the lessee without notice (*Corsellis v. London County Council*, 1907, 24 T. L. R. 80).

As to the conditions under which private roads may be dedicated to the public so as to cast on them the burden of upkeep and repair, see the Highways Act, 1835, 5 & 6 Will. iv. c. 50, s. 23.

The making of a private road is an authorised improvement under the Settled Land Act, 1882, 45 & 46 Vict. c. 38; see sec. 25 (8). As to the dedication of a road to the public and its adoption, see HIGHWAYS; and as to the acquisition of a private right of way by prescription, see PRESCRIPTION; EASEMENT.

[*Authorities*.—Glen on *Highways*, 2nd ed., 1897; Pratt on *Highways*, 15th ed., 1905.]

Privileged Debts.—See BANKRUPTCY, Vol. II. at p. 47.

Privilege (in French Law), a word met with in cases involving French law, the equivalent of preference as to the ranking of claims against an estate.

Privilege; Privileged Communication.

TABLE OF CONTENTS.

I. PRIVILEGED OCCASIONS . . .	622	(iii.) Publications made to protect the Defendant's own Interests . . .	628
II. ABSOLUTE PRIVILEGE . . .	622	(iv.) Common Interest, etc. . .	628
(i.) Parliamentary Proceedings . . .	623	IV. PRIVILEGED REPORTS . . .	629
(ii.) Judicial Proceedings . . .	623	(i.) Reports of Judicial Proceedings . . .	630
(iii.) Acts of State, etc. . .	625	(ii.) Reports of Parliamentary Proceedings . . .	632
III. QUALIFIED PRIVILEGE ARISING FROM DUTY AND INTEREST—LORD CAMPBELL'S CANON . . .	625	(iii.) Reports of the Proceedings at a Public Meeting . . .	632
(i.) Answers to Confidential Inquiries . . .	626	V. MALICE . . .	633
(ii.) Communications volunteered . . .	626	When Malice is in Issue . . .	633
Confidential Relationship . . .	627	What Malice is . . .	634
Where there is no Confidential Relationship . . .	627	Extrinsic Evidence of Malice . . .	634
		Intrinsic Evidence of Malice . . .	634

As to documents and communications privileged from disclosure either on discovery or at the trial of the action, see DISCOVERY, Vol. IV. p. 607; DOCUMENTS, DISCOVERY OF, *ibid.* p. 687; EVIDENCE, Vol. V. p. 377.

I. PRIVILEGED OCCASIONS.

There are occasions on which it is right that one man should speak plainly about another, and state fully and freely what he honestly believes to be the truth as to his character or means. Such occasions are deemed in law to be *privileged*; and it is a defence to an action of libel or slander that the words were published on a privileged occasion. In some cases the privilege is *absolute*, and the plaintiff cannot succeed, however maliciously the words were uttered; but the number of such occasions is comparatively small. In a far larger number of cases the privilege is only *qualified*; that is to say, the privilege affords the defendant a *prima facie* defence, but the interests of society do not require that he should be freed from all liability. Hence the plaintiff may still recover, if he can satisfy the jury that the defendant on the privileged occasion did not act in good faith, but published the words through some improper motive. This improper motive is called "malice" (*Clark v. Molyneux*, 1877, 3 Q. B. D., at pp. 246, 247).

Whether a particular occasion is or is not privileged, and whether the privilege, if any, is absolute or qualified, are questions of law for the judge as soon as the facts are ascertained or admitted; and it is for the defendant to satisfy the judge that the occasion is privileged. Whether the defendant on that occasion was actuated or not by malice, is a question of fact for the jury if the judge decides that the occasion is one of qualified privilege only; and it is for the plaintiff to prove malice, not for the defendant to establish his *bona fides* (*Jenoure v. Delmege*, [1891] A. C. 73).

II. ABSOLUTE PRIVILEGE.

On certain occasions the interests of society require that a man should speak out his mind fully and frankly, without thought or fear

of consequences. To such occasions, therefore, the law attaches an absolute privilege; and any action in respect of words so published is forbidden, even though it be alleged that they were spoken falsely, knowingly, and with express malice. This absolute privilege is confined to cases in which the public service or the administration of justice requires that complete immunity should be afforded. There are not many such cases, nor is it desirable that there should be many. The Courts will not extend the number (*Stevens v. Sampson*, 1880, 5 Ex. D. 53). As Lopes, L.J., says, in *Royal Aquarium v. Parkinson*, [1892] 1 Q. B., at p. 451: "The authorities establish beyond all question that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceedings before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. This 'absolute privilege' has been conceded on the grounds of public policy, to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who, from their high character, are not likely to abuse the privilege, and who have the power, and ought to have the will, to check any abuse of it by those who appear before them. It is, however, a privilege which ought not to be extended." It is not a privilege to be malicious, but a privilege that statements in judicial proceedings should be exempt from any inquiry whether they were prompted by malice or not, it being for the public interest that such statements should be made without any apprehension of subsequent legal proceedings (*Bottomley v. Brougham*, [1908] 1 K. B. 584).

Occasions absolutely privileged may be grouped under three heads:—

(i.) *Parliamentary Proceedings*; (ii.) *Judicial Proceedings*; (iii.) *Acts of State, etc.*

(i.) *Parliamentary Proceedings*.—It is specially enacted by the Bill of Rights, 1 Will. & Mary, stat. 2, c. 2, that "the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any Court or place out of Parliament." This statutory provision merely declares the common law on the subject (*Fielding v. Thomas*, [1896] A. C., at p. 612). Hence no action lies against a member of either House of Parliament for any words spoken in the House (*Dillon v. Balfour*, 1887, 20 L. R. Ir. 600). No indictment will lie for an alleged conspiracy by members of either House to make speeches defamatory of the plaintiff (*Ex parte Wason*, 1869, L. R. 4 Q. B. 573). A petition to Parliament, or to a committee of either House, is absolutely privileged, although it contain false and defamatory statements. So is all evidence given before a committee of either House (*Goffin v. Donnelly*, 1881, 6 Q. B. D. 307). But a publication of such petition or evidence to others not members of the House is not privileged unless the case falls within the provisions of 3 & 4 Vict. c. 9. By that statute parliamentary papers published by the authority of either House were rendered absolutely privileged, while an extract from or abstract of any parliamentary paper received a qualified privilege even though it was not published by the authority of Parliament.

(ii.) *Judicial Proceedings*.—Public policy requires that a judge on the bench, when dealing with the facts before him, that a party preferring

or resisting a legal proceeding, and that a witness who gives evidence orally or in writing in a Court of justice, shall do so with his tongue unfettered and his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. A judge of a superior Court has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously, knowing his words to be false, and also that his words were irrelevant to the matter in issue before him, and wholly unwarranted by the evidence (*Floyd v. Barker*, 1608, 12 R. 24; *Taaffe v. Downes*, 1813, 3 Moo. P. C. C. 36n.; *Fray v. Blackburn*, 1863, 3 B. & S. 576; *Anderson v. Gorrie*, [1895] 1 Q. B. 668). The judge of an inferior Court of record enjoys the same immunity, provided he has jurisdiction over the matter before him (*Scott v. Stansfield*, 1868, L. R. 3 Ex. 220); though for any act done in any proceeding in which he either knows, or ought to know, that he is without jurisdiction, he is liable as an ordinary subject (*Houlden v. Smith*, 1850, 14 Q. B. 841; *Calder v. Halket*, 1839, 3 Moo. P. C. 28; 13 E. R. 12; 50 R. R. 1; *Primrose v. Waterston*, [1902] 4 F. 783 (Court of Session)). No action will lie against a justice of the peace for defamatory words spoken by him on the bench in relation to any matter properly before him, even though the plaintiff asserts that such words were spoken maliciously and without reasonable or probable cause (*Law v. Llewellyn*, [1906] 1 K. B. 487). A similar immunity is enjoyed by counsel (*Munster v. Lamb*, 1883, 11 Q. B. D. 588), by an attorney acting as an advocate in a County Court or a Police Court (*Mackay v. Ford*, 1860, 5 H. & N. 792), and by a proctor in an Ecclesiastical Court (*Higginson v. Flaherty*, 1854, 4 Ir. R. C. L. 125). But the words must be "spoken in office" (*per* Lord Mansfield in *R. v. Skinner*, 1772, Lofft, at p. 56), that is, in the discharge of the speaker's duty before the Court. See ADVOCATE. The party himself, because of his ignorance of the proper mode of conducting a case, is allowed even greater latitude.

Any statement made by a witness in the box is absolutely privileged, so long as it has any reference to the matters in issue in the action, or fairly arises out of any question asked him by counsel on either side (*Seaman v. Netherclift*, 1876, 1 C. P. D. 540; 2 C. P. D. 53). So, too, all documents necessary to the conduct of the litigation, such as writs, pleadings, proofs of witnesses, and affidavits, are absolutely privileged, provided the proceeding is before a Court of competent jurisdiction (*Buckley v. Wood*, 1591, 4 R. 14b; 76 E. R. 888; Cr. Eliz. 230; 78 E. R. 486; *Kennedy v. Hilliard*, 1859, 10 Ir. C. L. R. 195; 1 L. T. 78; *Watson v. McEwan*, [1905] A. C. 480). The Discipline Committee of the Incorporated Law Society is a Court within this rule (*Lilley v. Roney*, [1892] 61 L. J. Q. B. 727). The report of an official receiver made to the Court under sec. 8, subs. 2, of the Companies (Winding-up) Act, 1890, is absolutely privileged (*Bottomley v. Brougham*, [1908] 1 K. B. 584). But an affidavit made voluntarily when no cause is pending, or made *coram non judice*, is not privileged at all (*Maloney v. Bartley*, 1812, 3 Camp. 210).

An absolute privilege also attaches to all proceedings of, and to all evidence given before, any statutory tribunal which, though not strictly a Court, exercises judicial functions, and also to all such preliminary steps as are in accordance with the recognised and reasonable procedure of that tribunal. The General Medical Council is such a statutory tribunal (*Dr. Groenvelt v. Dr. Burwell and Others, etc.*, 1700, 1 Ld. Raym. 454; 12 Mod. 388; *Allbutt v. General Medical Council*, 1889, 23 Q. B. D., at

pp. 408, 409; *Leeson v. G. M. C.*, 1889, 43 Ch. D. 366). So is the Central Midwives Board (*Re Feldmann*, 1907, 97 L. T. 548). In *Hodson v. Pare*, [1899] 1 Q. B. 455, absolute privilege was extended to evidence used in an application to a justice of the peace for an order for the detention and reception of an alleged lunatic under the Lunacy Act, 1890; while in *Barratt v. Kearns*, [1905] 1 K. B. 504, the Court of Appeal held that Commissioners appointed by a bishop under the Pluralities Acts, 1838 and 1885, were a judicial tribunal, and that, therefore, evidence given before them, though not on oath, was absolutely privileged. But a County Council is not a Court (*Royal Aquarium, etc., Society v. Parkinson*, [1892] 1 Q. B. 431), nor is it a statutory tribunal, for it does not exercise judicial functions (*per Wright, J.*, in *R. v. The London County Council*, 1894, 71 L. T., at p. 640).

(iii.) *Acts of State, etc.*—Every official statement made, and every official letter written, by an officer of the State in the course of the performance of his official duty is absolutely privileged (see ACT OF STATE). "It is not competent to a civil Court to entertain a suit in respect of the action of an official of State in making such a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it" (*Chatterton v. Secretary of State for India*, [1895] 1 Q. B. 191). A similarly absolute privilege extends to all acts of State and to the official notification thereof in the *London Gazette*, to all State papers, and to all advice given to the Crown by its ministers (*Oliver v. Lord William Bentinck*, 1811, 3 Taun. 456; *Grant v. Secretary of State for India*, 1877, 2 C. P. D. 445; *Doss v. Secretary of State for India*, 1875, L. R. 19 Eq. 509). All reports made by a military or naval officer to his superior officer in the course of his duty, all evidence given by any witness called at a court-martial or other military or naval court of inquiry—in short, all acts done in the lawful exercise of military or naval authority, are absolutely privileged; for it is essential to the welfare and safety of the State that the discipline of the service should be maintained without any interference by civil tribunals (*Home v. Bentinck*, 1820, 2 Brod. & B. 130; 22 R. R. 662, 748; *Dawkins v. Lord Rokeby*, 1875, L. R. 7 H. L. 744; *Dawkins v. Lord Paulet*, 1869, L. R. 5 Q. B. 94; *A.-G. of the Cape of Good Hope v. Van Reenen*, [1904] A. C. 114). But private letters written by the commanding officer of a regiment to his immediate superior on military matters, as distinct from his official reports, are not absolutely privileged; the judge should leave the question of malice to the jury, if there be any evidence to go to them on that issue, as in an ordinary case of qualified privilege (*Dickson v. Earl of Wilton*, 1859, 1 F. & F. 419; *Dickson v. Combermere*, 1863, 3 F. & F. 527).

See Odgers on *Libel and Slander*, 4th ed., pp. 218-233.

QUALIFIED PRIVILEGE.

Occasions of qualified privilege may be grouped under two heads:—

- Privilege arising from Duty and Interest.
- Privileged Reports.

III. QUALIFIED PRIVILEGE ARISING FROM DUTY AND INTEREST.

The fundamental rule or canon by which such privileged occasions are to be ascertained is thus laid down by Lord Campbell, C.J., in *Harrison v. Bush*, 1855, 5 El. & Bl., at pp. 348, 349:—

"A communication made *bonâ fide* upon any subject-matter, in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*. And the word 'duty' cannot be confined to legal duties, which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation."

Both parties, then, must have either an interest in the subject-matter of the communication, or some duty to discharge in connection with it. The law does not protect idle gossip or officious interference in the affairs of other people. It must be the defendant's duty, or it must be to his interest, to speak or write as he does; and, moreover, the person to whom he speaks or writes must have either some duty to perform in the matter, or some legitimate interest in the subject. The duty, as Lord Campbell says, need not be one which would be enforced in a Court of law; a social or moral duty will be sufficient. "I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle" (*per* Lindley, L.J., in *Stuart v. Bell*, [1891] 2 Q. B., at p. 350). It is for the judge to decide in each case whether a duty—legal, moral, or social—exists (*ibid.*). So, too, the interest need not necessarily be pecuniary. On the other hand, mere curiosity is not sufficient. It must be an interest which the law recognises and approves.

Let us apply this rule to special cases:—

(i.) *Answers to Confidential Inquiries*.—All answers to confidential inquiries are privileged. "If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered; and the answer is a privileged communication" (*per* Brett, L.J., in *Waller v. Loch*, 1881, 7 Q. B. D., at p. 622). The commonest instance of this is the "character" of a servant. If a lady is asked as to the capabilities and character of a former servant by any one who has the right to ask the question, it is the lady's duty to state fully and frankly her honest opinion of the former servant, whether it tell in her favour or not. The same rule applies whenever a confidential inquiry is made—say, as to the solvency of a tradesman, or as to the competency and skill of a professional man. If the person inquiring has a legitimate interest in obtaining the information, it is the duty of those to whom he applies to give him a direct and honest answer to his question. There is, then, that necessary concurrence of duty and interest which creates a privilege. There must be some good reason for the question; the reply must be given seriously and honestly; it must be a relevant answer to the question, and not branch out into immaterial matters. Subject to these limitations, "every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made" (*per* Grove, J., in *Robshaw v. Smith*, 1878, 38 L. T., at p. 424).

(ii.) *Communications volunteered*.—There is but little difficulty when the communication complained of as defamatory is made in answer to a previous inquiry by a person interested. But there are cases in which it becomes a man's duty to go of his own accord to his neighbour, or even to a stranger, and give him certain information unasked. As a rule, no doubt, his safer course would be to wait till he is applied to; but life or property may be in imminent and obvious peril, or there may be other circumstances which make it clearly the duty of a good

citizen to go at once to the person most concerned and tell him of the danger, without waiting for him to come and inquire. It may well be that that person has no suspicions, and never would inquire into the matter, unless warned. Yet it is not easy to lay down any general rule, defining the cases in which it is one's duty to volunteer information, at the risk of being deemed officious and meddlesome.

Confidential Relationship.—It is A.'s duty to volunteer such information to B., whenever a confidential relationship exists between A. and B.—whenever B. reposes trust and confidence in A., and could justly blame A., if he remained silent. Such a confidential relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, employer and employee, principal and agent, solicitor and client, partners, or even intimate friends. Thus it is clearly the duty of B.'s steward, bailiff, foreman, or housekeeper, to whom he has intrusted the management of his lands, business, or house, to inform him if they know of anything wrong, and not to wait till his own suspicions are aroused, and he begins to make inquiries. So B.'s family solicitor may voluntarily write and inform B. of anything which he thinks it is to B.'s advantage to know. But it would be dangerous for another solicitor, whom B. had never employed, to volunteer the same information; for till B. retains him or seeks to retain him in the matter, there is no confidential relation existing between them (*Browne v. Dunn* (H. L.), 1893, 6 R. 67). So a father, guardian, or an intimate friend, may warn a young man against associating with a particular individual; or may warn a young lady not to marry a particular suitor; though in the same circumstances it might not be the duty of a mere stranger to give such a warning (*Todd v. Hawkins*, 1837, 8 Car. & P. 88; 56 R. R. 834). So, if the defendant is in the army or in a Government office, it would be his duty to inform his official superiors of any serious misconduct on the part of his subordinates; but not, as a rule, to report on the conduct of his superiors or those of equal rank or standing with himself (*Stace v. Griffith*, 1869, L. R. 2 P. C. 420).

Where there is no Confidential Relationship.—The privilege is not confined to cases in which the parties stand in a confidential relationship to each other (*Stuart v. Bell*, [1891] 2 Q. B. 341). The rule of law is laid down by Blackburn, J., in much wider terms: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bonâ fide* and without malice does tell them, it is a privileged communication" (*Davies v. Sneed*, 1870, L. R. 5 Q. B., at p. 611). But it is often difficult to say in a particular case whether it has or has not "become right" for the defendant to take action. This is a question rather of morality than of law; and the answer must depend on the facts of each particular case. Clearly, a man ought not to stand by and do nothing, when human life is in obvious danger, or when he has really strong grounds for suspecting that a crime is about to be committed. But in other cases our judges have frequently differed in opinion. If A. learns that one of his tradesmen is about to supply goods on credit to a man whom A. reasonably believes to be practically insolvent, ought A. to warn him not to do so? Is it right, in the interests of society, that A. should tell the tradesman what he knows, or must he stand by and see him lose his money? In the reign of Queen Elizabeth, and again in the days of George III., it was held that no action would lie for such a

caution, if it were given as "good counsel," and not out of malice against the intending purchaser (*Vanspike v. Cleyson*, 1597, Cro. (Eliz.) 541; 78 E. R. 788; *Herver v. Dawson*, 1765, Bull. N. P. 8). But in 1838 Lord Abinger, C.B., held that such a communication should not be volunteered; the defendant must wait till the tradesman applies to him for advice (*King v. Watts*, 8 Car. & P., at p. 615). And in *Bennett v. Deacon*, 1846, 2 C. B. 628; 69 R. R. 568, the Court of Common Pleas was equally divided on this question. Our present judges incline to follow the judgments of Tindal, C.J., and Erle, J., rather than those of Coltman and Cresswell, JJ., in this case, and would probably hold that such a caution was *prima facie* privileged. In *Coxhead v. Richards*, 1846, 2 C. B. 569; 69 R. R. 530, the same Court was equally divided on a very similar question, whether a disinterested third person may inform the owner of a ship that his captain had been guilty of gross misconduct at sea. Here, again, the view taken by Tindal, C.J., and Erle, J., would probably prevail in the present day. There was in 1891 a similar difference of opinion among our judges in the case of *Stuart v. Bell*, [1891] 2 Q. B. 341.

(iii.) *Publications made to Protect the Defendant's own Interests.*—Whenever the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has some duty to perform in the matter, the occasion is privileged. For instance, if any man is charged with misconduct, he is entitled to defend himself. If A.'s servant injures B.'s property, B. is entitled to complain to A., and both the complaint and any answer to the complaint are privileged. So if C. has been treated with incivility by a guard or a porter, C. may report the matter to the railway company; if his letters are not delivered regularly, he may complain to the Postmaster-General. In short, all communications made reasonably in self-defence, to protect the defendant's private interests, or to answer some attack made by the plaintiff, are privileged (*Blackham v. Pugh*, 1846, 2 C. B. 611; 69 R. R. 555; *Laughton v. Bishop of Sodor and Man*, 1872, L. R. 4 P. C. 495; *Baker v. Carriek*, [1894] 1 Q. B. 838; *Campbell v. Cochrane*, [1906] 8 F. 205 (Ct. of Sess.)). Anyone who honestly believes he has a grievance is entitled to seek redress in the proper quarter (*Jenoure v. Delmege*, [1891] A. C. 73; *Cassidy v. Connochie*, [1907] S. C. 1112 (Ct. of Sess.)).

But he must apply to a person who has some duty or interest in the matter. It is not sufficient that the defendant honestly believed that such person had jurisdiction. Thus in the case of *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54, the jury found in favour of the defendants, that they honestly and reasonably believed that the Board of Guardians had jurisdiction in the matter, and was consequently the proper authority to whom to apply. But the Court of Appeal held that finding to be immaterial. The fact was that the Board had no jurisdiction, and was not the proper authority to whom to apply; and that fact destroyed the claim of privilege.

(iv.) *Common Interest.*—Whenever two or more persons have a legitimate interest in the same matter, all communications passing between them with reference to that matter are privileged. Such common interest is generally a pecuniary one, such as two shareholders in the same company, or two creditors of the same debtor, possess. But it may also be professional, as in the case of two officers in the same corps, or masters in the same school, anxious to preserve the

dignity and reputation of the body to which they both belong. In short, it may be any interest arising from the joint exercise of any legal right or privilege, or from the joint performance of any duty imposed or recognised by the law. Thus two executors of the same will or two trustees of the same settlement have a common interest, though not a pecuniary one, in the management of the trust estate. Relations by blood or marriage have a common interest in their family concerns. So the ratepayers of a district or parish have a common interest in the selection of fit and proper officers to serve on the district or parish council. But the "common interest" must be one which the law recognises and appreciates. No privilege attaches to gossip, however interesting it may be to both speaker and hearers. If, in fact, the defendant has no other interest in the matter beyond that which any other educated person would naturally feel, interference on his part will be deemed officious and unprivileged (*Botterill v. Whytthead*, 1879, 41 L. T. 588).

Again, a clergyman or parish priest has no right in the course of a sermon to "make an example" of a member of his flock, by commenting on his misconduct, and either naming him or alluding to him in unmistakable terms. If he does so, his words will not be privileged, although uttered with the honest desire to reform the culprit and to warn the rest of his hearers. It is quite possible that the congregation would feel more interest in this part of the discourse than in any other; but that will not create any privilege (*Magrath v. Finn*, 1877, Ir. R. 11 C. L. 152).

Many other instances might be given of occasions to which the law attaches a qualified privilege by reason of duty or interest. But the general rule is clear: Both the defendant and the person with whom he communicates must have either an interest in the subject-matter of the communication or some duty to discharge in connection with it; otherwise there is no privilege. And even where there is such a privilege, the plaintiff can destroy it by proving that the defendant was actuated by malice.

See Odgers on *Libel and Slander*, 4th ed., pp. 234-289.

IV. PRIVILEGED REPORTS.

At common law any one who repeats or reports defamatory words is as liable to an action as the person who first set the falsehood in circulation. The fact that the defendant did not himself invent the story is no answer to an action for damages brought by the person defamed. For the defendant has indorsed the tale by repeating it; he has given it increased weight and credit, and started it on a fresh career of mischief. This is especially so if the repetition be in a newspaper. Hence, whenever false defamatory words were uttered at a public meeting, and reported in the local newspaper, the proprietor was liable to pay damages. It was of no avail for him to urge that there was an entire absence of malice, that the report was published in the ordinary course of his business as a journalist, that he deemed it to be his duty to present his readers with a full, true, and impartial account of what had really taken place at a public meeting on the previous evening. It is seldom that any libel is inserted in a newspaper out of actual malice. But the absence of malice affords no defence to an action unless the occasion be privileged (see *Shepherd v. Whitaker*, 1875, L. R. 10 C. P. 502). Again, it was of no avail for him to urge that the speaker was known, and that the

plaintiff should have sued him, and not the paper which merely reported his remarks. The person defamed is in no way bound to sue the speaker, even though the paper named him. The speaker may not be worth suing. Or, if he be, still the fact that some one else is liable will not affect the right of the plaintiff to sue the paper. He may sue the paper or the speaker, or both, if he likes; though he probably would not recover substantial damages from both (see *Harrison v. Pearce*, 1858, 1 F. & F. 567; 32 L. T. (O. S.) 298). It might happen that the original remark was a *bonâ fide* comment on a matter of public interest, and therefore not actionable as a slander; if so, it of course would remain a *bonâ fide* comment, and therefore no libel, when printed in the newspaper. But in every other case, if an action was brought, the paper had to pay damages, unless the words could be shown to be literally true. And it makes no difference in law that the defamatory words are preluded with such phrases as "We hear," or "We are credibly informed," or "We have it on the best authority that," etc. Such phrases will not prevent or diminish the liability of the writer. There is one exception: if, when reporting defamatory words, he named his authority—"X. told me so and so"—then he may give evidence to show that X. did in fact tell him so; but in mitigation of damages only, not as any defence to the action.

This was a sensible and salutary rule of the common law. For it is the republication in the columns of a newspaper, and not the original utterance, which seriously injures the reputation of the person attacked at such a meeting. The consequences of reporting in the local paper calumnies uttered at some political or parish meeting may be very serious. The meeting may have been thinly attended, and the audience may have known that the speaker was not worthy of credit; it was the newspaper that printed and published the falsehood to all the world. Charges recklessly made in the excitement of the moment are thus diffused throughout the country, and remain recorded in a permanent form against a perfectly innocent person. Moreover, additional importance and weight is given to such calumny by its republication in the columns of a respectable paper. Many people will believe it merely because it is in print. There is an immense difference between the injury done by such a slander and that caused by its extended circulation by the press (see the summing-up of Huddleston, B., in *Kelly v. O'Malley*, 1889, 6 T. L. R., at p. 64).

Nevertheless the rule was not without exception. It is for the public good that the proceedings in Parliament and in the Law Courts should be fully known and accurately reported, even though defamatory statements concerning individuals should thereby receive a wider circulation. Hence reports of all judicial and parliamentary proceedings were privileged at common law.

(i.) *Reports of Judicial Proceedings*.—A fair and accurate report of any proceeding held openly in any Court of law is privileged; and on this ground—that, as every one cannot be present in Court, it is for the public benefit that they should be informed of what takes place substantially as if they were present (*per* Gorell Barnes, P., in *Furniss v. Cambridge Daily News*, 1907, 23 T. L. R. 705). So is every accurate transcript of any record of a Court. It is immaterial that the record is in itself inaccurate provided the defendant has copied it correctly, and was unaware of its inaccuracy when he copied it (*MacCabe v. Joynt*, [1901] 2 Ir. R. 115). The privilege is not confined to newspapers or

magazines. Any one may report fully any proceeding which is in its nature judicial (even though it be an *ex parte* proceeding, *Usill v. Hales*, 1878, 3 C. P. D. 319; *Kimber v. The Press Association*, 1892, 8 T. L. R. 671; (C. A.), [1893] 1 Q. B. 65); except in two cases:—

(a) When the Court has itself prohibited the publication, as it frequently did in former days. Every Court has the power of preventing the publication of its proceedings pending litigation (*R. v. Clement*, 1821, 4 Barn. & Ald. 218; 23 R. R. 260). But such a prohibition now is rare.

(b) When the subject-matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication; in which case it is a criminal offence to publish even a fair and accurate report of such proceedings (*R. v. Mary Carlile*, 1819, 3 Barn. & Ald. 167; 22 R. R. 338; *Steele v. Brannan*, 1872, L. R. 7 C. P. 261).

Newspapers were formerly expected to reserve all report of a case till the trial was ended, but now it is clear that reports may be published of the proceedings day by day, provided the whole trial is fairly reported sooner or later (*Lewis v. Levy*, 1858, El. B. & E. 537; 27 L. J. Q. B. 282; *Kimber v. The Press Association*, [1893] 1 Q. B. 65). Such a report need not be *verbatim*; it may be abridged or condensed, but it must not be partial or garbled. It is not necessary to state all that occurred *in extenso*; but if any fact be omitted which would have told in the plaintiff's favour, while other facts which tell against him are stated in full, it will be a question for the jury how far the omission is material, and whether such deviation from absolute accuracy makes the report unfair (see *Stockdale v. Tarte*, 1836, 4 Ad. & E. 1016).

The jury, in considering the question, should not dwell too much on isolated passages; they should consider the report as a whole (see *Shipley v. Todhunter*, 1836, 7 Car. & P., at p. 690). They should ask themselves what impression would be made on the mind of an unprejudiced reader who reads the report straight through, knowing nothing about the case beforehand. Slight errors may easily occur; and if such errors do not substantially alter the impression which the ordinary reader would receive, the jury should find for the defendant. If, however, there is a substantial misstatement of any material fact, and such misstatement is prejudicial to the reputation of the plaintiff, then the report is unfair and inaccurate, and the jury should find for the plaintiff. Thus, the entire suppression of the evidence of one witness may render the report unfair (see *Rumney v. Walter*, 1892, 8 T. L. R. 256).

The reporter should always report the sworn testimony of the witnesses rather than the speeches of the counsel; for counsel are often instructed to open to the jury facts which they subsequently fail to prove (*Lewis v. Walter*, 1821, 4 Barn. & Ald. 605; 23 R. R. 415). He should record fully the summing-up of the learned judge, which is often in itself a fair summary of the whole case (see *Milissich v. Lloyds*, 1877, 46 L. J. C. P. 404; 36 L. T. 423; *MacDougall v. Knight*, 1886, 17 Q. B. D. 636; 1889, 14 App. Cas. 194). And he must confine himself to reporting what really occurred in open Court. He must not print private gossip about the case. He must not publish evidence which might have been, but was not, given in Court (*R. v. Gray*, 1861, 26 J. P. 663); nor observations made by a witness after he has left the box (*Hope v. Leng*, 1907, 23 T. L. R. 243). He must add no comments or anything else of his own. His duty is to reproduce precisely what happened at the trial, so

as to put those who were not present as much as possible in the position of those who were. He must not in the report state his own opinion of the conduct of the parties, or discuss their motives; for no privilege will attach to these remarks. Such comments may perhaps be justifiable on another ground, that they are fair and *bonâ-fide* criticism on a matter of public interest. But, if so, they should not be mixed up with the history of the case, but should be put in the form of a short paragraph or leading article (*Andrews v. Chapman*, 1853, 3 Car. & Kir., at p. 288); and they must not be published till the trial is over (*Lewis v. Levy*, *supra*).

All sensational headings to reports should be avoided. Thus, where the *Observer* published a fair and correct account of certain legal proceedings, headed, "Shameful Conduct of an Attorney," the attorney recovered damages for the heading (*Clement v. Lewis*, 1822, 3 B. & B. 297; 3 Barn. & Ald. 702; 22 R. R. 533). So where a similar report was headed, "How Lawyer B. treats his Clients," the judge held that this amounted to a charge that Lawyer B. *generally* treated his clients as this particular client had been treated, and the defendant had to apologise and pay costs (*Bishop v. Latimer*, 1861, 4 L. T. 775).

Such reports are not absolutely privileged. If the plaintiff can prove that the reporter or the newspaper proprietor (whichever he has made defendant) published the report, not in the ordinary course of his duties as a journalist, but out of express malice against the plaintiff, then he will be entitled to recover damages. If, for instance, one of the parties to an action, or his solicitor, sent a fair and accurate report of the case to the papers, he (but *not* the newspaper) would be liable to pay damages, if the jury thought that he did so maliciously (*Stevens v. Sampson*, 1879, 5 Ex. D. 53). See, however, sec. 3 of the Law of Libel Amendment Act, 1888, 51 & 52 Vict. c. 64.

(ii.) *Reports of Parliamentary Proceedings.*—Every fair and accurate report of any proceeding in either House of Parliament is privileged, even though it contains matter defamatory of an individual. The analogy between such reports and those of legal proceedings is now complete; and precisely the same questions must be left to the jury in both cases. There was for a long time great doubt on this subject, which arose from the fact that there were Standing Orders of both Houses of Parliament prohibiting all such reports; and it was argued with some force that no privilege could attach to anything which was published in contravention of such Standing Orders, and which was therefore in itself a contempt of the House. But in 1868 the law was clearly and satisfactorily settled by the decision in *Wason v. Walter*, L. R. 4 Q. B. 73. See this decision discussed in Odgers's *Outline of the Law of Libel*, pp. 148-154.

(iii.) *Reports of Public Meetings, etc.*—The common law protected only fair and accurate reports of judicial and parliamentary proceedings. No other reports were privileged. This was decided in two important cases: *Davison v. Duncan*, 1857, 7 El. & Bl. 229, and *Popham v. Pickburn*, 1862, 7 H. & N. 891. Hence, if a newspaper published an accurate report of a speech made at a political meeting, or at the meeting of any vestry or town council, the proprietor was liable in damages if that speech contained defamatory matter, which was not a fair comment on a matter of public interest, and which he could not prove to be literally true. No privilege at all attached to any report, however fair and accurate, of the proceedings at such a meeting. Thus in *Purcell v.*

Sowler, 1877, 2 C. P. D. 215, the proprietor of the *Manchester Courier* was held liable for a report, which was admitted to be accurate, of a discussion that had taken place on a matter of public interest at a meeting of a Board of Guardians.

It was mainly in consequence of this decision that the Newspaper Libel and Registration Act, 1881, 44 & 45 Vict. c. 60, was passed. The second section of that Act conferred a privilege, of a limited kind, on fair and accurate reports of certain public meetings. But to bring himself within the protection of this section, the proprietor or editor of a newspaper had to prove, not only that the meeting was "a public meeting," "lawfully convened for a lawful purpose and open to the public," and that the report was "fair and accurate, and published without malice," but also that the publication of the matter complained of was for the public benefit. This last proviso rendered this section practically nugatory (see *Pankhurst v. Sowler*, 1886, 3 T. L. R. 193).

Another bill was brought into Parliament in 1888, which became the Law of Libel Amendment Act, 51 & 52 Vict. c. 64. This considerably extended the privilege afforded by the former Act, sec. 2 of which it repealed. But it still leaves it the duty of the editor to edit all reports of public meetings, and excise every matter that is "not of public concern, and the publication of which is not for the public benefit" (see *Kelly v. O'Malley*, 1889, 6 T. L. R. 62; *Chaloner v. Lansdown & Sons*, 1894, 10 T. L. R. 290). Sec. 4 of this Act of 1888 is the only provision which affords any protection to reports of the proceedings of any public meeting. If the defendant claims privilege for any such report, he must show that it comes within this section; else it remains at common law unprivileged. It is submitted that meetings of the creditors of a bankrupt, or of the shareholders in a company, or of the subscribers to a particular charity, are not "public meetings" and that the proceedings thereat cannot be reported without risk; but see *Ponsford v. Financial Times, Ltd.*, 1900, 16 T. L. R. 248. A district, county, or borough council has power to exclude reporters from its meetings if it thinks fit (*Mayor, etc., of Tenby v. Mason*, [1908] 1 Ch. 457).

For a detailed history of these two important measures, see Appendix B. to Odgers on *Libel and Slander*, 4th ed., pp. 759-771.

V. MALICE.

When Malice is in Issue.—To a plea of qualified privilege, it is a good reply that the defamatory words were published maliciously. Till such a plea is placed on the record, malice is no part of the issue. And the plaintiff is not bound to try and prove the existence of malice, unless and until the judge rules that the occasion is privileged. If the judge rules that the occasion is not privileged it will be no defence to the action (though it may reduce the amount of the damages) that the jury expressly find that there was no malice on the part of the defendant (*Blackburn v. Blackburn*, 1827, 4 Bing. 395; 3 Car. & P. 146; 29 R. R. 583; *Wenman v. Ash*, 1853, 13 C. B. 836, 845; 22 L. J. C. P. 190, 193; *Huntley v. Ward*, 1859, 6 C. B. N. S. 514; 1 F. & F. 552). The plaintiff is in that case entitled to recover damages for the injury done to his reputation, whether such injury was accidental or malicious. On the other hand, should the judge rule that the occasion was absolutely privileged, there is an end of the case; and judgment will pass for the defendant, however malicious he may have been. Should the judge

rule that the occasion was one of qualified privilege, then and then only does an issue as to malice arise; in that event, the plaintiff will recover if he can prove malice in the defendant; if he cannot, his action fails. The burden of proving malice lies on the plaintiff; whenever the only evidence relied on for this purpose is equally consistent with *bona fides* and with malice, the judge should stop the case (*Somerville v. Hawkins*, 1851, 10 C. B. 590; 20 L. J. C. P. 131; *Taylor v. Hawkins*, 1851, 16 Q. B. 308; 20 L. J. Q. B. 313; *Spill v. Maule*, 1869, L. R. 4 Ex. 232; *Turner v. Bowley & Son*, 1896, 12 T. L. R. 402).

What Malice is.—"Malice" does not mean 'malice in law,' a term in pleading, but actual malice . . . a wrong feeling in a man's mind" (*Clark v. Molyneux*, 1877, 3 Q. B. D., at p. 247). Mere stupidity or forgetfulness is not malice, nor is negligence, nor careless blundering, nor want of sound judgment, nor honest indignation. But it is proof positive of malice if the jury are satisfied that the defendant did not honestly believe in the truth of the charge he made at the time he made it. It never can be a man's duty to circulate a falsehood.

Evidence of Malice.—The existence of malice may be established in two ways:—

(a) By *extrinsic* evidence showing that there were former disputes or actual ill-feeling between the parties, or other libels or slanders published by the defendant of the plaintiff, whether before or after those sued on (*Chubb v. Westley*, 1834, 6 Car. & P. 436).

(b) By *intrinsic* evidence, such as the unwarranted violence of the defendant's language, or the unnecessary extent of the publication (see *Fryer v. Kinnersley*, 1863, 15 C. B. N. S. 422; 33 L. J. C. P. 96; *Gilpin v. Fowler*, 1854, 9 Ex. 615; 25 L. J. Ex. 152; *Spill v. Maule*, 1869, L. R. 4 Ex. 232).

Thus, if a servant can show that her master, whether from any ill-feeling against her, or from a desire to retain her in his own service, gave her a bad character when he knew that she deserved a good one, that would prove that he was acting maliciously, and all privilege would be lost. So if she can satisfy the jury that the former master made statements about her character or her work, recklessly, not knowing or caring whether they were true or false, such recklessness is evidence of malice to go to the jury (*Rogers v. Sir Gervas Clifton*, 1803, 3 Bos. & Pul. 587; 33 R. R. 216; *Fountain v. Boodle*, 1842, 3 Q. B. 5; 61 R. R. 121; *Jackson v. Hopperton*, 1864, 16 C. B. N. S. 829; 12 W. R. 913).

So, too, in answering a confidential inquiry made by one who has a right to be told the facts, each statement should be made under a serious sense of responsibility and with an honest desire to deal fairly with the plaintiff as well as with the person who asks for the information. The defendant must be especially careful, if he is merely repeating something that he has heard, not to heighten its colour or exaggerate its import; he should tell his correspondent that he does not know it of his own knowledge, but only by hearsay; he should not state a rumour as a fact. Above all, he must honestly believe in the truth of the charge he makes at the time he makes it. And this implies that he must have *some* ground for the assertion; it need not be a conclusive or convincing ground; hearsay will be sufficient, if from a reliable source; but no charge should ever be made recklessly and wantonly, even in confidence. And this is still more imperatively necessary where the information is volunteered; there it is not enough that the defendant sincerely believed in the truth of what he wrote, the jury must also be satisfied that he

wrote it under a strong sense of duty which compelled him to take the unusual course of communicating with the person concerned before any inquiries were made (*Botterill v. Whytehead*, 1879, 41 L. T. 588).

Communications which impute crime or misconduct to others should always be made with the honest desire to promote the ends of justice, and not with the purpose of obtaining any indirect advantage for the writer. Serious accusations should not be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion (*Stuart v. Bell*, [1891] 2 Q. B. 341). They must not be written on a postcard (*Robinson v. Jones*, 1879, 4 L. R. Ir. 391; *Sadgrove v. Hole*, [1901] 2 K. B. 1), nor made unnecessarily to persons whom they do not concern, nor before more persons, nor in stronger language, than necessary (*Padmore v. Laurence*, 1840, 11 Ad. & E. 380; 52 R. R. 374). But the publication of a letter by the defendant to his own clerks, if made in the reasonable and ordinary course of business, will not of itself destroy any privilege attaching to the letter (*Boxsins v. Goblet Frères*, [1894] 1 Q. B. 842; *Edmondson v. John Birch & Co., Ltd.*, [1907] 1 K. B. 371). Again, where charges are made on a privileged occasion, still the jury may hold that the defendant acted maliciously, if he eagerly seized on some slight and frivolous matter and made no proper inquiry into the merits, but wrote or spoke the words without satisfying himself that the account of the matter that had reached him was correct (*Fairman v. Ives*, 1822, 5 Barn. & Ald. 642; 24 R. R. 514; *Elliott v. Garrett*, [1902] 1 K. B. 870; *White & Co. v. Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K. B. 653; *Edmondson v. Birch & Co., Ltd.*, [1905] 2 K. B. 523). But where a defendant has made careful investigation of the facts and has honestly arrived at a definite opinion, the fact that he reasserts that opinion after he has been informed that other persons of equal ability and standing in his profession differ from him, is no evidence of malice; it is proof rather of *bona fides* (*A. v. B.*, [1907] S. C. 1154 (Court of Session)).

So with statements which a defendant deems it necessary to make in order to protect his private interests or interests which he holds in common with others. In the first place, the defendant must honestly believe that he possesses the right which he claims. And this involves that he must have some ground for making such a claim (*per* Maule, J., in *Pater v. Baker*, 1847, 3 C. B., at p. 868; 71 R. R. 503). Next, in claiming a right for himself, or in resisting a claim made by another, the defendant must be careful to use temperate language, and to restrict himself to matters relevant to the claim. It is seldom necessary in self-defence to impute evil motives to others, or to charge your adversary with dishonesty or fraud. If, therefore, in writing or speaking on a privileged occasion the defendant breaks out into irrelevant charges against the plaintiff, such excess may be some evidence of malice (*Huntley v. Ward*, 1859, 6 C. B. N. S. 514; *Warren v. Warren*, 1834, 1 C. M. & R. 251).

If, however, the plaintiff's conduct was in any way relevant to the occasion which creates the privilege, and the defendant honestly believed that conduct to be such as he described it, the mere fact that he used strong words in so describing it is no evidence of malice to go to the jury (*Spill v. Maule*, 1869, L. R. 4 Ex. 232). The test appears to be this: The jury should take the facts as they appeared to the defendant's mind at the time of publication, and then ask themselves whether the terms used are such as the defendant might have honestly employed

under the circumstances? If so, the strength of his language points to *bona fides* rather than to malice. It is not enough that the expressions are angry, the jury must go further and see that they are malicious. "A man may use excessive language, and yet have no malice in his mind" (*per* Lord Esher, M.R., in *Nevill v. Fine Art, etc., Co., Ltd.*, [1895] 2 Q. B., at p. 170).

A corporation is liable for words published on a privileged occasion by its officer or servant if the plaintiff can prove that such officer or servant was actuated by malice, and was acting within the scope of his employment when he published the words (*Citizens' Life Assurance Co., Ltd. v. Brown*, [1904] A. C. 423).

See Odgers on *Libel and Slander*, 4th ed., pp. 319-346.

Privileges, Committee for.—This body is a committee of the House of Lords. It is a standing committee re-appointed at the beginning of each session, is of the whole House, and is presided over by the Chairman of Committees. It is concerned with the privileges, Parliamentary and otherwise, of the peers of Great Britain and Ireland, and of Lords of Parliament, and of peeresses in their own right, and of peers' wives and widows possessing privilege of peerage. Its principal duty is the examination of claims to peerages. Previous to Stuart days the question of the right to a dignity or honour was examined by the Crown or by high officials to whom the Crown had referred any questions in dispute. The old practice, which in its initial stages still obtains, was for the aggrieved individual to petition the Crown. This petition was then, usually as a matter of course, referred to the Court of the Constable and Marshal, later known as the Court of Chivalry (*q.v.*). The procedure in early Stuart days is fully described by Milles in his *Political Nobility*, the material parts of which are cited in Cruise on *Dignities* (1823 ed.), p. 251.

The Court of Chivalry had already lost much of its importance by the practical abolition of the office of High Constable in the reign of Henry VIII., but the Earl Marshal seems to have continued its jurisdiction by sitting alone in so far as matters concerning arms and honour were debated. In 1568 there was a claim to the Barony of Dacre of Gillesland, and the Earl Marshal of the day being intimately related to the parties Queen Elizabeth issued a commission to several members of the Lords to act in his stead, but saving his rights for the future. At times when the office of Earl Marshal was in commission claims to dignities were referred to the Commissioners, though in one instance a claim to the Barony of De la Warre was referred by Queen Elizabeth to the House of Lords as a whole (11 Co. Rep. 1; 77 E. R. 1145). The House, much as it does now, sent the matter to a committee. The case was heard by counsel in the presence of the judges, the committee afterwards reporting to the House, which accepted the report, and directed the Lord Keeper to acquaint the Queen, who confirmed their resolution. The first claim which appears to have been discussed by the Lords was that of the Earldom of Arundel in 11 Henry VI. (Cruise on *Dignities*, ch. ii. 60), but this was apparently in the nature of a general parliamentary debate, as the matter was settled by Act of Parliament.

In the early part of the reign of James I. the practice seems to have varied, some cases being sent to the judges, some to the Commission for marital causes and others to the House of Lords direct (Cruise, *ibid.*, ch. vi. 253). Undoubtedly the historic case of the claims to the

Earldom of Oxford, the Lord Great Chamberlainship, and several baronies in 1625 helped to fix the practice, Charles I. in his reference to the Lords stating:—

"Since these petitions concern so great an honour and office of inheritance, and that it falls out so opportunely during the sitting of our High Court of Parliament, we think it fit to take the advice of our Lords and Peers of our Higher House of Parliament, who have the judges with them, for their assistance in any point of law which may arise. Therefore our pleasure is, that their Lordships call the competitors before them, and examine their titles, and certify us what they find, and their opinions thereof, whereupon we shall do that to either party which shall be just."

In 1638, however, the same King referred some points concerning the Barony of Stafford to a commission of inquiry specially constituted by Letters Patent, but as a question of surrender was concerned the King may have thought it safer not to risk the opinion of the Lords (Cruise, *ibid.*, ch. vi. 252). But from the reign of Charles II. the practice has been settled, and though the claim to the Barony of Fitzwalter was heard at the Council Board it had been originally referred to the Lords, whose report had not been made owing to a long-continued prorogation of Parliament.

The first definite record of the appointment of a committee for privileges occurs in 1620 when the Journal of the House of Lords records that certain Lords are "named and appointed to take consideration of the customs and orders of this House and of the privileges of the peers of the Kingdom and Lords of Parliament," further, their Lordships, (who are numerous, though eight are stated to be a quorum) "are to call and to attend them as they shall see cause, the Lord Chief-Justice of the King's Bench, Mr. Justice Doddridge, Mr. Serjeant Crew, Mr. Attorney-General, and such other of His Majesty's learned counsel as their Lordships shall think fit," and, moreover, "the Lords Committees for the Privileges are to meet in the Painted Chamber" (Lords' Journals, iii. 10). In a short space of time the committee became practically permanent and for many years has been re-appointed regularly at the beginning of every session of Parliament. At the beginning of the existing Parliament the Committee was constituted according to the following customary motion. "That all the Lords who have been or who shall be present this session be appointed a committee to consider of the Orders and customs of their House and Privileges of Parliament, and of the Peers of Great Britain and Ireland, and Lords of Parliament. Their Lordships, or any of them, to meet in the House of Peers, when, and as often as they please, provided that three Peers, designated Lords of Appeal in the Appellate Jurisdiction Act, 1876, be always present at the sitting of the committee" (Lords' Journals, cxxxviii. 34).

The exact rights of the House of Lords (which are invariably referred to and examined by the Committee for Privileges) on matters of dignities and honours are difficult to define. The House, as a House of Parliament, has an inherent right to examine into the pretensions of all those who claim to be admitted to it, and although it is open to the Crown to create any name of dignity it pleases, such dignity confers on its holder no right of admission to the House as a Lord of Parliament unless it be one of the five hereditary names of dignity which compose the peerage. This right is original and inherent, and was successfully asserted in the *Wensleydale Case*, when the Crown endeavoured to create

a non-hereditary peerage carrying with it a seat in the House of Lords, but was obliged to defer to an adverse resolution of the Lords dealing with the case (*Pike's Const. Hist. House of Lords*, pp. 376 *et seq.*).

But with respect to claims to peerage dignities such cases go first to the King, who may issue at his pleasure a writ of summons to any subject. If the petitioner be claiming an ancient peerage, which he does by asking for a summons in the name of that peerage, the Sovereign may accede to the petition at once by issuing the writ of summons. But in such a case the House of Lords might examine into the pedigree of the new lord, and if it were found faulty would be within its rights in insisting that the new peer's peerage and precedence should date only from his writ. Briefly, the Crown can make any man a peer, but it cannot supply him with a pedigree, which will as a matter of course be accepted as correct.

The duty of issuing writs of summons devolves upon the Lord Chancellor, and if on the demise of a peer the reputed heir's position does not appear entirely satisfactory on examination of the usual documents and information required the writ is withheld. The only remedy then is a petition to the Crown through the Home Secretary. The petition is referred to the Attorney-General for examination and report, who notifies the petitioner and requires him to deposit for examination all the documentary evidence relating to his claim. The petitioner may also be required to attend personally or by agent or counsel before the Attorney-General. After the case has been examined the Attorney-General reports to the Crown, and if a *prima facie* claim is made out, usually advises that the case is one which is fit to be examined by the House of Lords. On the other hand, he may advise that the claim is unreasonable and unlikely to be successful, in which case nothing more would be done. He may, on the other hand, advise that the case is so clear that it needs no further examination. Usually if a *prima facie* case is made out the Crown refers the petition together with the Attorney-General's report to the House of Lords for examination. The same procedure is followed where a claim to an abeyant peerage is made, though the Crown does not always refer such claims to the House of Lords, especially when the abeyance is recent and the pedigree clear. When the House has a reference from the Crown this is committed to the Committee for Privileges before whom a full judicial inquiry, governed by strict rules of evidence, takes place. The committee then arrives at a resolution stating that the claimant has or has not made out his case, accompanying the bare statement of facts with such explanations or riders as may be deemed fit. The House as a rule adopts the resolution and reports to the King through the Lord Chancellor. If the claim is one of right, a writ of summons is issued at once; but if one in which the prerogative is concerned, such as the termination of an abeyance, the King's pleasure must be awaited, it not being an invariable rule that a peerage will be called out of abeyance merely because a claimant establishes his co-heirship. The following rules as to presenting cases, hearings, etc., have been laid down by the committee in their Standing Orders relating to peerage claims.

(a) There shall be no hearing upon any claim to a title of honour until fourteen days after printed cases shall have been delivered, which shall contain a pedigree, and also an abstract of the proofs and authorities upon which such claim may be founded, together with the dates thereof, and references where the same may be found; and that every

petitioner shall within six weeks after his petition shall have been presented to the House if Parliament shall then be sitting, and if not within six weeks after the next meeting of Parliament, lay his printed case, pedigree, and proofs on the table.

(b) In all claims of peerage the following directions shall be observed with regard to documents delivered in at the bar in evidence and the examination of those documents when printed by order of the House:—

1. No original of any record or document in public custody in the United Kingdom shall be required to be produced before the committee without a written order for such production signed by the Lord Chancellor or the Chairman of Committees. Such records and documents shall be proved by copies as in ordinary legal proceedings pursuant to the Public Record Act, 1838, 1 & 2 Vict. c. 94, and the Documentary Evidence Acts subsequently passed (*Lords' Journals*, cxxxiv., 76, 140).

2. In the case of documents in private custody the original documents and copies thereof shall be delivered in by a witness, who will be required to swear that he has examined the copies with the originals, and that the copies are correct.

3. In unopposed peerage claims the print shall be examined against the original documents where the same have been delivered in, or, in other cases against the officially certified copies, by a competent examiner appointed by the Crown agent. In opposed peerage claims the Crown agent shall, if he think fit, appoint a competent examiner for the purpose of the above examination. The cost of the examination shall be borne by the petitioner adducing the evidence.

In all claims of peerage all the expenses attending the taking and printing of the evidence are borne by the claimant.

In all peerage claims in which it is desired to give in further evidence the agent of the petitioner is required, on making his application to the Clerk of the Parliaments for a meeting of the Committee for Privileges, to lodge in the Judicial Office a full written or printed statement of the objects for which the meeting of the committee is desired; together with an abstract of the proofs, documentary or oral, which it is proposed to adduce, and in which the branch or branches of the case upon which they bear shall be clearly indicated. Copies of the document must be left with the Crown agent (and in the case of opposed claims, with the opposing agent) at the time of making the application to the Clerk of the Parliaments.

It will be gathered from the rules quoted that the general practice of the committee follows that of an ordinary trial in the House of Lords, slightly varied to suit the circumstances of each case.

Whether opposed or not it is the claimant's duty to prove his case. The Attorney-General is present to protect the interests of the Crown and to assist the committee if called upon to do so. Where there is a question of law involved which may dispose of the claim, the committee may, as they did in the *Barony of Lucas Case* (1907), hear the point of law argued, and then allow the evidence to be put in subsequently, but the usual practice is to present the case complete as a whole. Claims to an abeyant peerage are, strictly speaking, merely in the nature of proceedings to prove co-heirship. A claimant must prove his own pedigree and also account for the pedigrees of all other co-heirs, in order that the Crown may know among whom its choice may be exercised (*Braye Peerage*, 1836-39, 6 Cl. & Fin. 757; 7 E. R. 882); and in such cases there can be no opposers in the strict sense of the word as the proof required

from each claimant is identical. Where the Lord Chancellor is not satisfied with the evidence produced by the presumed heir to an Irish peerage, the latter's right to vote at Irish representative peers' elections must be proved before the Committee for Privileges in the same manner as if the proceedings were an ordinary peerage claim, and until this course has been taken the name will not be placed on the Roll of Irish Peers. The same procedure must be followed in the case of disputed succession to Scottish peerages which have been the subject of report to the House of Lords. The machinery of the Committee for Privileges was used for the purpose of settling the conflicting claims to the Lord Great Chamberlainship in 1901. The reference to the House of Lords was direct from the Crown, and though the hearing proceeded generally as would a peerage claim, much material not strictly legal evidence was admitted.

Broadly speaking, as its name imports, every matter concerning privilege of peerage or of the Upper House is referred to this committee. The following instances may be given. In Stuart days the committee considered whether privilege of Parliament extended to dowager peeresses (Lords' *Journals*, x. 104), and decided later that a widowed peeress by marriage who marries a commoner forfeits her privilege of peerage (Lords' *Journals*, xi. 298). In more recent years the House of Lords, sitting as the Supreme Court of Appeal (to hear a claim by a peer whose wife had divorced him to enjoin her from bearing his title after she had married again), expressed the opinion that such a matter, being one of honour or dignity belonged to the House sitting as a Committee for Privileges (*Cowley v. Cowley*, [1901] A. C., at p. 454). Three years ago the Lord Chancellor summoned the committee to ask their advice on the application of Lord Kinross, a peer of the United Kingdom, and a member of the bar, to appear as counsel before the House of Lords sitting as the Supreme Court of Appeal, and decided in his favour (*In re Lord Kinross*, [1905] A. C. 468).

The Committee for Privileges is not strictly a legal body, and therefore its decisions are not of binding authority on the ordinary Courts, but inasmuch as three Lords of Appeal are required to be in attendance at all hearings, and as in fact it is seldom that more than one or two lay lords attend regularly, its decisions are treated with the greatest respect, especially as the majority of its regularly attending members are also members of the judicial body of the House of Lords. As to their own proceedings resolutions of the peers deliberately and expressly laid down must, when in point, always be followed (*Earldom of Norfolk Peerage Case*, [1907] A. C. 10).

Privilegium clericale.—See BENEFIT OF CLERGY.

Privy.—(See also ASHPITS.) Under the Public Health Acts, local sanitary authorities have large powers and duties for securing proper privy accommodation for houses. No house may now be newly erected or rebuilt without a sufficient water-closet, earth-closet, or privy (38 & 39 Vict. c. 55, s. 35). This, however, may be for the use of two or more houses in common, if the accommodation provided is sufficient (*Clutton Union v. Pointing*, 1879, 4 Q. B. D. 340). Where an existing house appears to a local authority, on the report of the surveyor or inspector of nuisances, to be without proper accommodation, the local authority shall require the owner or occupier to provide what they deem neces-

sary. If their notice is not complied with, they may themselves do the required work at the expense of the owner (s. 36). But if, in their opinion, a privy used in common by the inmates of two or more houses is sufficient, they need not interfere (*ibid.*). The local authority may also require separate accommodation to be provided for factories or buildings, in which persons of both sexes are employed in any manufacture, trade, or business. Any person who neglects or refuses to comply with such requirement is liable to a penalty (s. 38). The powers of this section were extended in 1887 to portions of a coal mine above ground in which girls and women are employed (50 & 51 Vict. c. 58, s. 74). In urban districts, where the Public Health Act, 1890, 53 & 54 Vict. c. 59, is in force, sec. 38 of the Act of 1875 is repealed, and in its stead sec. 22 of the later Act applies. By it every building used as a workshop or factory, or where persons are employed or intended to be employed in any trade or business, whenever it was erected, must be provided with sufficient and suitable accommodation in the way of sanitary conveniences, and, where persons of both sexes are employed, with proper separate accommodation for persons of each sex. The urban authority may require the owner or occupier of such building to make such alterations or additions therein as may be required to give such accommodation.

Although sec. 91 of the Public Health Act, 1875, provides for the sanitation and cleanliness of factories, workshops, and work places, and the provisions are enforceable by the local sanitary authority, sec. 1 (2) of the Factory and Workshop Act, 1901, 1 Edw. VII. c. 22, provides that, so far as factories under the Act are concerned, their supervision as to sanitation shall be taken away from the local authority. This supervision is placed in the hands of the local factory inspector generally. The immediate supervision of workshops remains in the hands of the local authority as before, but the factory inspector is given power by secs. 4 and 5 of the Act (*ibid.*) to interfere, in certain events, where, in his opinion, the local authority are not properly carrying out their duties.

Factories and workshops must, by sec. 9 (1), *ibid.*, be provided with sufficient and suitable sanitary accommodation, as laid down in sec. 22 of 53 & 54 Vict. c. 59, set forth *supra*. Where there is any neglect or default (which may be in relation to a privy) the factory inspector is first to give notice in writing of the act complained of to the local district council, who must make inquiry and take such action as is necessary to enforce the law. The inspector may, under the Act, take proceedings himself, and apparently where he does so in an urban district the justices have no power to inquire into the sufficiency or suitability of the sanitary condition of the factory, as required by the inspector, but are bound to inflict a penalty if the requirements of his notice have not been properly complied with. It seems, however, that the factory owner, if dissatisfied with the notice, might appeal to Quarter Sessions, under sec. 7 of the Public Health Act, 1890, 53 & 54 Vict. c. 59, as to the sufficiency of the accommodation (*Tracey v. Pretty*, [1901] 1 Q. B. 444).

An urban authority may also, if they think fit, themselves provide and maintain, in proper and convenient situations, privies, etc., for public accommodation (Act of 1875, s. 39). See also 7 Edw. VII. c. 53, *supra*, s. 47, which gives extended powers of a similar kind in districts where the Act is in force. The lavatories may be made in or under any

street for the use of the public. Attendants may be employed and reasonable charges made (other than for use of urinals). By-laws may be made to regulate such places, which may be let out at a rent, such charges and conditions being imposed as the local authority deem proper. The choice of situation is intrusted to the urban authority, but they cannot place these conveniences in private ground against the will of the owner (*Sellors v. Matlock Board*, 1885, 14 Q. B. D. 928; *Baird v. Tunbridge Wells*, [1896] A. C. 434). They have full discretion as to site, shape, and extent when erecting buildings where they have property in the soil, whether above or beneath public roads, but they must not interfere with footways (Public Health (London) Act, London, 1891, c. 76, s. 44; *Mayor of Westminster v. London and North-Western Rly. Co.*, [1905] A. C. 426).

Where any sanitary convenience which opens on to a street (in any area where by order the 7 Edw. VII. c. 53, Part III., is in force) is so placed or constructed as to be a nuisance or offensive to public decency, the local authority may, by notice in writing, require the owner to remove it within a reasonable time fixed by them (*ibid.*, s. 43). Inns, public-houses, beerhouses, eating-houses, refreshment-houses, or places of public entertainment are required to provide and maintain proper urinals in a suitable position (*ibid.*, s. 44). Cesspools, or other receptacles for excreta, may, on the report of one of their officers, be ordered to be closed by the local authority (*ibid.*, s. 46).

Local authorities have the duty of seeing that privies, drains, etc., are so kept as not to be a nuisance or injurious to health (s. 40). For this purpose they have power to enter and examine suspected premises; and if they find anything amiss, shall forthwith require the owner or occupier of the premises to do such works as in their judgment are necessary. Non-compliance with such a notice entails a penalty for every day's default (s. 41; see also 53 & 54 Vict. c. 59, ss. 19 and 21). If the owner or occupier is summoned for such default, the Court of summary jurisdiction cannot inquire whether the works ordered were really necessary; that is a matter to be determined by the local authority (*Hargreaves v. Taylor*, 1863, 3 B. & S. 613), though apparently the owner or occupier could appeal under sec. 7 of 53 & 54 Vict. c. 59 to Quarter Sessions as to the sufficiency of the accommodation (cp. *Tracey v. Pretty*, [1901] 1 Q. B. 444). Now by sec. 34 of the Public Health Acts Amendment Act, 1907, 7 Edw. VII. c. 53, the local authority has similar powers to those above-mentioned where, on the report in writing of their surveyor or inspector of nuisances, they have reason to suspect that any drain, water-closet, earth-closet, privy, ashpit, or cess-pool is a nuisance or injurious to health.

Besides the above power for requiring that privies, etc., if insufficient or out of repair, shall be put right, local authorities, where privies are so foul or in such a state as to be a nuisance or injurious to health, may have them dealt with summarily (Act of 1875, s. 91). If the magistrates who hear the case are satisfied that the alleged nuisance exists, or is likely to recur, they must make an order requiring the nuisance to be abated and the execution of any works necessary for that purpose (*ibid.*, s. 96). Penalties are imposed for disobedience to such an order, and the local authority are in such case empowered to enter the premises and abate the nuisance, and do whatever may be necessary in execution of such order, at the expense of the person on whom the order was made (s. 98). It seems now to be settled that the local authority

are the proper body to decide what works are required (*Hargreaves v. Taylor, supra*; *Clerkenwell Vestry v. Feary*, 1890, 24 Q. B. D. 703), and that the justices should by their order direct them to be done (see further, NUISANCE).

By the Public Health Acts Amendment Act, 1907, 7 Edw. VII. c. 53, Part III., which extends to any part of England and Wales (except London) in which it may be put into force by order of the Local Government Board, extensive powers are given by secs. 34-51 of the Act with respect to closet accommodation. By sec. 39, in new buildings the local authority may insist upon the supply of a proper and sufficient number of water-closets and slop-closets, and if the owner does not provide these, may carry out the work themselves and charge him, recovering summarily as for a civil debt.

Further, wherever there is, in the opinion of the local authority, in an existing building insufficient closet accommodation, and a proper supply of water can be obtained, then they may insist on a proper number of water-closets and slop-closets. Also, where there is sufficient water supply, they may insist on the conversion of existing accommodation to a water-closet and slop-closet system. The local authority may do the work if the proper parties fail. If the work is the conversion of a pail-closet system, the local authority must pay, but if the conversion of an existing system other than a pail-closet, then the owner must pay half. The owner's share is recoverable as a civil debt. Where joint-owners are concerned the local authority's surveyor apportions the cost. If his award is disputed, there is an appeal to a petty sessional Court.

A local Act provided that where any house was without sanitary conveniences, or without such of a construction and size approved by the corporation, the latter might require the owner to provide or alter such conveniences as and in the manner notified. Held that the owner of a house already provided with privies, though these were of good construction and sufficient for the needs of the houses, might be compelled to substitute water-closets, and, further, to provide one for each house (*Smith v. Greenwood*, [1907] 2 K. B. 385, following *Agnew v. Manchester Corporation*, 1903, 67 J. P. 174).

By sec. 42 there is a right of appeal against the local authority to a Court of summary jurisdiction, and the Court may make such order as seems equitable, and the order shall be binding and conclusive on all parties. The right of appeal, subsequent to the service of a demand for payment, is restricted to the ground of the reasonableness of the amount of the expenses, and the appellant is precluded at that stage from raising any other question.

Important sanitary powers as to *London* are given now by 54 & 55 Vict. c. 76, ss. 37-46. Every house newly erected or rebuilt must have one or more proper and sufficient *water-closets*. Old houses may be left with such accommodation in common if the sanitary authority deem this sufficient, but a new house must apparently have separate accommodation for itself (s. 37). Factories *must* be provided with sufficient and suitable sanitary conveniences, and the sanitary authorities are charged with the duty of seeing that this requirement is complied with (s. 38). The County Council and the sanitary authority are both required to make by-laws dealing with water-closets, and the County Council with other conveniences also (s. 39). Penalties are imposed on various acts of neglect or misfeasance whereby sanitary conveniences may become offensive or a source of danger to health (ss. 41, 42); and sanitary authorities

are themselves empowered, if they think fit, to enter on premises and execute such works as may be necessary for the abatement of the nuisance (s. 43). They are expressly empowered to provide and maintain public sanitary conveniences in neighbourhoods where they deem the same to be required. And, in order to avoid doubts which were raised by some earlier decisions (*supra*), it is declared that the subsoil of any road is for this purpose vested in the sanitary authority (s. 44). Where they provide sanitary conveniences, they may make regulations and by-laws for their management, and charge fees for the use of lavatories or water-closets. It is also provided that henceforth no public convenience shall be erected in or accessible from any street without the consent in writing of the sanitary authority; this, however, does not apply to railway stations (s. 45). The sanitary provisions relating to workshops and bakehouses will be found in secs. 22-27. Where a by-law under the Act provided that "every person who shall intend to construct any water-closet . . . or to fit or to fix in or in connection with any water-closet any apparatus or any trap or soil-pipe, shall before executing any such works give notice in writing to the Clerk of the Sanitary Authority," it was held to apply to water-closets constructed before as well as to those existing after the by-law came into force (*London and South-Western Rly. Co. v. Hills*, [1906] 1 K. B. 512).

A local authority may, under sec. 2 of the Public Health Act, 1875, undertake the cleansing of earth-closets, privies, and ashpits in their district without at the same time undertaking the cleansing of cesspools (*Stainland Industrial Society v. Stainland U. D. Council*, [1906] 1 K. B. 233).

Privy Council.

TABLE OF CONTENTS.

History	644	Appeals to the King in Council	649
Privy Council at Present Day	646	Proceedings on Appeals	651
Judicial Committee	648		

History.—In the Middle Ages it was an accepted rule of English constitutional practice that the King ought to act in matters of importance with the advice of the *magnates* or great men of the realm. The nobles, assembled on special occasions by special writs, formed the Great Council or Common Council of the realm, which developed into the Parliament. The chief advisers of the King, who were permanently about him, formed the Permanent or Continual Council. This body included the Justiciar (while there was a Justiciar), the Chancellor, the Lord Treasurer, and other officers of State, and the two archbishops, who claimed a right to form a part of every Council, public or private. In 1404 the Council consisted of three bishops, nine peers, six knights, and one untitled person; the councillors usually held office for the life of the King who appointed them, and they received a salary. At this period the various powers of government were not accurately distinguished; the King in Council exercised legislative, executive, and judicial authority. During the minority of Henry VI. the functions of the councillors regularly attending were very important; a distinction began to be drawn between the general body of councillors, sometimes called by historians the Ordinary Council, and the Privy Council,

which included only those who were confidentially employed in business of State.

While the Council retained and strengthened its position, its powers were gradually restricted by the development of other institutions. In the first place, Parliament claimed exclusive authority in matters of legislation; and it was contended by common lawyers that the King in Council could not alter the law by proclamation. By the 31 Hen. viii. c. 8, the King's proclamation acquired the force of law; but this Act was repealed by 1 Edw. vi. c. 12; and in the Case of Proclamations (12 Rep. 74), Coke induced the judges to declare that the King could create no new offence by proclamation.

In the second place, the executive business of the nation became in time too complicated to be controlled by a single Board. Separate departments were organised, under ministers who communicated directly with the King and with Parliament. The two Secretaries of the Council became Secretaries of State; and this was the origin of the five secretarial departments now existing. In the seventeenth century, there were frequent complaints in the House of Commons that the King had given up the old custom of debating matters of State "publicly, at the Council table," and was guiding himself by the advice of a cabinet or cabal. After the Restoration, the custom of consulting the whole body of the councillors fell into disuse; Charles II. was of opinion that the number of the Council made it "unfit for the secrecy and despatch which are necessary in many great affairs." In 1679 the King was persuaded to adopt a plan of reconstruction prepared by Sir W. Temple; a representative Council of thirty was appointed; but this body was found to be too large, and the King once more had recourse to a cabinet or confidential committee of Council. Down to the end of Queen Anne's reign, the Sovereign was present at Cabinet meetings; but when George I., who knew no English, came to the throne, the King's confidential servants met without him; the King's approval of their resolutions was obtained by one of their number, who enjoyed the royal confidence in a special degree. The accession of the house of Hanover thus marks the transition from personal government to the modern system of government by Prime Minister and Cabinet.

In the third place, the judicial authority of the Council, discredited by the oppressive use which was made of it by the Tudors and the Stuarts, was reduced to narrow limits by the legislation of 1640. After the establishment of the Courts of common law, petitions for justice continued to be presented to the King in Council, especially in cases when the Courts were liable to be intimidated by a powerful defendant. If such a petition raised a question of law, it was usually referred to the Chancellor, and in time the Court of Chancery became a recognised branch of the judicature. But the King and his councillors still retained a wide jurisdiction as a tribunal of first instance; they inflicted severe punishments, and their sentences were felt by many to be oppressive, because they were pronounced after inquiries conducted in the Council chamber, without the safeguards of trial by jury. By the 3 Hen. vii. c. 1, and the 21 Hen. viii. c. 2, this jurisdiction was expressly confirmed. These Acts have sometimes been regarded as giving authority for the establishment of the Court of Star Chamber; but the Star Chamber was in fact the Council, or a committee of Council, though it usually included some judges, not employed by the King in matters of State, and therefore perhaps not to be described as members of the Privy

Council. By the 16 Car. I. c. 10, the Star Chamber and its jurisdiction were abolished. Since the passing of that Act, the Council has not exercised the powers of a tribunal of first instance. All privy councillors are qualified to act as magistrates, and in case of necessity the Council may make inquiries, but it cannot punish offences, and a person committed by order of the Council may sue out his writ of *habeas corpus*. The Act of 16 Car. I. did not take away the appellate jurisdiction of the King in Council. It has always been a rule of our constitution that the subject who failed to obtain justice in the ordinary Courts might go in the last resort to the King himself. Petitions for the correction of errors in the proceedings of the Courts were presented to the King in Parliament or to the King in Council. The King's English subjects preferred to go to the King in Parliament, and in course of time the House of Lords was recognised as the Court of final appeal for England, and for the United Kingdom generally. The King's subjects beyond seas found that their petitions were more speedily heard if addressed to the King in Council; the Council Board thus became the tribunal of final appeal for the colonies and India. In 1832 appeals in ecclesiastical cases were transferred from the High Court of Delegates to the King in Council.

The history of the Privy Council is fully treated in Mr. Dicey's well-known essay, and in Sir W. Anson's *Law and Custom of the Constitution*, pt. ii. ch. iii. The *Proceedings and Ordinances of the Privy Council*, edited by Sir H. Nicolas, are brought down to the reign of Henry VII.; the series is continued in the *Acts of the Privy Council*, edited by Mr. J. Roche Dasent; the last volume published brings the record down to 1603.

At the union with Scotland it was enacted by the 6 Anne, c. 40, that there should be one Privy Council for Great Britain. For the history of the Scottish Council, see the *Register of the Privy Council of Scotland*, edited by J. Hill Burton and David Masson. At the union with Ireland, that country was allowed to retain its separate Privy Council. In some British colonies, the governor is assisted by a body of advisers styled the Privy Council; in all the colonies the powers of the Executive Council are modelled to some extent on those exercised by His Majesty in Council.

The Privy Council of the Present Day.—The true Privy Council of the present day is the Cabinet, but we continue to give the old name to a large body of eminent persons, most of whom are never consulted by the Crown in matters of State. There are now more than two hundred privy councillors; they may be roughly classified as follows:—1. A number of noblemen, selected chiefly from those of the highest rank. These may be taken to represent the *magnates* or great men of the realm. 2. Persons who hold or have held high political office. A person who is appointed a Secretary of State, for example, or President of the Board of Trade, is always sworn of the Council. Subordinate members of the ministry are not usually made privy councillors, unless by way of special distinction. Members of the diplomatic service who attain the rank of ambassador are usually added to the Council. Persons engaged permanently in any department of the public service are not appointed, unless on retirement after long and distinguished service. 3. The Lord Chancellor, the Lords of Appeal in Ordinary, the Lord Chief-Justice of England, Master of the Rolls, and President of the Probate, etc., Division are always privy councillors, as also are the Lords Justices of Appeal, the Lord President of

the Court of Session in Scotland, and the Lord Justice-Clerk. Judges of the High Court are not appointed, unless on retirement. The English law officers are not usually privy councillors; the Lord Advocate for Scotland is. 4. The Archbishops of Canterbury and York and the Bishop of London always have seats at the Board; other bishops are added only by way of special distinction. 5. Persons distinguished in colonial politics have been appointed by way of reward for conspicuous services to the empire; and in 1897 the Premiers of all the colonies which have responsible government were sworn of the Council. 6. In a few cases the rank of privy councillor has been conferred upon persons highly distinguished in science or in letters.

These eminent persons are described collectively as the Lords and others of His Majesty's Most Honourable Privy Council, and each of them is entitled to be addressed as Right Honourable. When they are assembled as a Board, the place at the head of the table is His Majesty's, and in his absence it is vacant. The Lord President of the Council sits on his right hand, the Lord Chancellor on his left; the other councillors according to their precedence, as determined by rank and seniority of standing. Differences have arisen from time to time as to the order of precedence, and a pamphlet on the subject was printed by C. G. Young in 1860.

A privy councillor is appointed without patent or other formal grant; the King invites him to take his seat at the Board, and thereupon he is sworn to advise the King according to the best of his cunning and discretion; to advise for the King's honour and the good of the public, without partiality through affection, love, need, doubt, or dread; to keep the King's counsel secret; to avoid corruption; to help and strengthen the execution of what shall be resolved; to withstand all persons who would attempt the contrary; and generally to observe, keep, and do all that a true councillor ought to do to his sovereign lord. A privy councillor holds office during the life of the Sovereign who appoints him, and for six months thereafter; according to modern practice, the appointment is renewed on a demise of the Crown. The Sovereign may at any time strike the name of a privy councillor from the list. George III. is said to have struck off Mr. Fox's name with his own hand; at the present day it is not probable that such a step will be taken unless on the advice of a responsible minister. The duties imposed on a privy councillor as such are now merely nominal, and there is no salary or allowance attached to the position.

Meetings of the whole Council are held only on occasions of state and ceremony, as at the beginning of a new reign, or when the reigning Sovereign announces his or her marriage. On such occasions the Lord Mayor of London is summoned to attend the Council.

Formal meetings of the Council are held as public business may require—usually about eight times a year. To these meetings the King summons only the few councillors who happen to be in immediate attendance. Formerly, when matters of State were “publicly” discussed at the Board, a councillor not summoned would sometimes insist on his right to be present. The business of the Council is now of a formal nature. The orders submitted for His Majesty's approval have been prepared, and, if necessary, explained to His Majesty by the responsible officers of the departments from which they come. The legal powers of the Council are for the most part so framed that they cannot be exercised unless His Majesty is present. But the Council may meet,

and, if empowered to do so, may make orders in the absence of the Sovereign. For the form of an order so made, see *The Hendrick*, 1 Act. 324.

The Lord President of the Council is appointed by a declaration made in Council by His Majesty; he is a Cabinet minister of the highest rank. The office of the Clerk of the Council dates from 1540; all orders made in Council are authenticated by the signature of the Clerk. By the Act of 1833, which constituted the Judicial Committee, the King was empowered to appoint a Registrar of the Privy Council.

Throughout its history the Council has been accustomed to do most of its business by means of committees. The Cabinet, the Board of Trade, the Local Government Board, the Education Department, and the Board of Agriculture are all, in their origin, Committees of Council. Of the Judicial Committee it will be necessary to speak more at length.

The Judicial Committee.—Down to 1833 appeals to the King in Council were few in number; they were heard by committees specially appointed, usually in vacation, when the judges were free to attend. By the 3 & 4 Will. iv. c. 41, a Judicial Committee was constituted, to consist of all members of the Privy Council holding or having held the office of Lord President or Lord Chancellor, or any of the high judicial offices enumerated in the Act. The provisions of the Act have since been extended to all the high judicial offices mentioned in the Appellate Jurisdiction Acts of 1876 and 1887. The Lords of Appeal in Ordinary are members of the committee.

By the Act of 1833 the King was empowered by his sign manual to appoint "any two other persons being privy councillors" to be members of the committee. Lord James of Hereford and Sir A. Scoble are the existing members added to the committee under this power.

By the same Act it was provided that two members of the Privy Council, having held the office of judge in the East Indies or in any of His Majesty's dominions beyond seas, and attending the sittings of the committee, should be entitled to receive an allowance of £400 a year each during their attendance. By the 50 & 51 Vict. c. 70, it was enacted that if there should be only one such member of the committee, he might be permitted to draw both allowances. Sir C. Bonsor and Sir A. Wilson are at present the members appointed under this rule.

By the 58 & 59 Vict. c. 44, it was enacted that the judges of certain colonies (the self-governing colonies) should, if members of the Privy Council, be members of the committee. In 1897 the Chief-Justices of Canada, Cape Colony, and South Australia were sworn of the Council, and became members of the committee.

In cases arising under the Clergy Discipline Acts, the Board is assisted by three bishops as ecclesiastical assessors. The two Archbishops, the Bishop of London, and the other bishops attend in their turns, as fixed by the Order in Council of the 28th November 1884. In appeals from Colonial Admiralty Courts, two nautical assessors are usually in attendance. In all cases where assessors attend, they are in no way responsible for the judgment of the Board; they are present merely to give an opinion on points with which their lordships are not professionally familiar.

The right of audience at the bar of the Privy Council belongs to members of the English, Scottish, or Irish Bar, and to those Indian and

Colonial practitioners whose position corresponds to that of barristers in this country. The persons qualified to practise as agents before the Privy Council, are English solicitors or proctors, Scotch Writers to the Signet, etc., who have been admitted and placed on the roll at the Council Office as directed by the Order in Council of the 6th March 1896. Solicitors, etc., not practising in London, are usually required to give a London address at which they may be served with notices, etc.

The committee sits at the Council Chamber, Whitehall, and the forms of a Committee of Council are carefully observed. Council and parties are directed to withdraw if their lordships have occasion to deliberate; and the judgment takes the form of a report to His Majesty; if there is any difference of opinion, the report embodies the views of the majority, and dissenting opinions are not published. In the case of *Rinsdale v. Clifton*, 1877, 2 P. D. 276, Kelly, C.B., maintained that he had a right to let it be known that he did not agree with the report; his action led to an interesting controversy. An Order in Council of the 4th February 1878, confirming an old Order of the 20th February 1627, directed that the "ancient rule and practice of the Privy Council" should be observed in the Judicial Committee, and that no publication should be made how the particular voices and opinions went. For a list of the pamphlets and letters written on this occasion, see Phillimore, *Ecclesiastical Law*, 2nd ed., p. 976.

The jurisdiction of the committee is derived from the orders of reference made by the King in Council. In the month of November in each year a General Order is made, referring all appeals to His Majesty in Council to the committee. Petitions for the extension of the term of letters patent see specially referred under sec. 25 of the Patents Act, 1883. See PATENTS. His Majesty may also refer legal questions of a general nature to this committee; but their lordships will usually interpret the terms of such a reference rather strictly; and they will decline to express an opinion, in general terms, on questions which may afterwards come before them for judicial determination (see article MALTA). In some cases, questions which are both legal and political are referred to a mixed committee. Where the removal of a colonial judge is in question (see the articles AMOTION; COLONY), the Colonial Secretary sits with the members of the Judicial Committee; where the rights of the States of Jersey have been brought into question, the matter in dispute may be referred to a committee for Jersey and Guernsey, on which the Home Secretary sits with some of the members of the Judicial Committee.

Appeals to the King in Council—Colonial and Indian Appeals.—There is an appeal to His Majesty in Council from the highest civil Court of each separate colony or province of his dominions beyond seas, whether it is a Court of error or not. This is sometimes described as an appeal as of right; but the appellant is usually required to obtain leave from the Court whose judgment is appealed against; and the right to appeal may be restricted by imperial enactment, by Order in Council, by the rules of practice observed in the committee, or by local legislation.

Speaking generally, there is no appeal as of right, unless from a final and definitive judgment. The appellant must prove his good faith by entering and prosecuting his appeal within a year and a day.

To these restrictions the local law usually adds these three requirements: that leave to appeal must be asked within a certain time; that the value of the matter in dispute must exceed a certain sum; and that the appellant must find security for costs.

Appeals may be admitted by special leave in cases where there is no appeal in the ordinary course. His Majesty may give leave to appeal from an interlocutory order, where it appears that the case can be substantially disposed of without waiting for final judgment. In a case where unreasonable delay was permitted in the Court below, their Lordships ordered a petition for leave to appeal to stand over, and intimated that, unless the case was disposed of within four months, they would advise His Majesty to give leave to appeal from an interlocutory order. Leave to appeal may be given where it appears that some important right or principle is brought into question, although the value of the matter in dispute may be less than the required amount. In criminal cases their Lordships will not advise His Majesty to grant leave, unless there is reason to apprehend that a serious miscarriage of justice may have taken place, or that the Court below has acted without jurisdiction.

The conditions on which appeals are admitted from the King's dominions beyond seas are contained in local and imperial statutes, charters of justice, and Orders in Council. Some information will be found in Macqueen's *Appellate Jurisdiction*, 1842 ed., at p. 699, and in Gerald Wheeler, *Confederation Law of Canada*; the subject is most fully treated in Safford and Wheeler, *Privy Council Practice*, published in 1901. The matters provided for by local rules are, the time within which the petition must be presented, the appealable amount or value, the security for costs to be given by an appellant, etc.

Appeals from Consular Courts.—The final appeal from the Courts established in the exercise of Foreign Jurisdiction (*q.v.*) lies to the King in Council. The conditions on which such appeals are admitted are embodied in the Orders in Council by which the Courts are established and regulated; see the official collection of Statutory Rules and Orders, and Hertslet's *Treaties*.

Appeals from Prize Courts.—Under the Naval Prize Act, 1864, an appeal lies as of right from the final decree or order of a Prize Court, and in other cases by leave of the Court. The term Prize Court includes—(1) The High Court, which is constituted a Prize Court by the Judicature Act, 1891, this part of its jurisdiction being exercised in the Probate, Divorce and Admiralty Division; (2) the Colonial Courts of Admiralty, to which the jurisdiction of the Vice-Admiralty Courts was transferred in 1890. In the case of the High Court, the inhibition staying proceedings in the inferior Court must be abstracted within three months; but this period may be extended by the Judicial Committee. When the Colonial Court is empowered to act as a Prize Court, the petition of appeal must be lodged within six months of the date of the judgment, or of the date when leave to appeal is granted.

Ecclesiastical Appeals.—This is an appeal from the Archbishops' Courts under 25 Hen. VIII. c. 19, and 2 & 3 Will. IV. c. 92; the appeals which formerly lay to the King in Chancery (*i.e.* to the High Court of Delegates) having been transferred to the Judicial Committee. Appeals are also brought under the Church Discipline Act, 1840; the Public Worship Regulation Act, 1874; and the Clergy Discipline Act, 1892. The conditions on which appeals are admitted and the rules of practice

will be found in Safford and Wheeler, chap. xiii.; see also Phillimore, *Ecclesiastical Law*. All spiritual causes competent to the Court of Arches (see ARCHES, COURT OF), whether affecting the Sovereign or not, may be taken to the Judicial Committee on appeal (*Gorham v. Bishop of Exeter*, 1850, 5 Ex. Rep. 630). Even complaints against bishops may come within the committee's cognisance (*Ex parte Read*; *In re Bishop of Lincoln*, 1888, 58 L. J. P. C. 32). An appeal is not competent where the case is one for the exercise of the bishop's discretion (see *Poole v. Bishop of London*, 14 Moo. P. C. 263, a case arising out of the revocation of a curate's licence under 1 & 2 Vict. c. 106). It is probable that no appeal lies from the authority constituted by the Benefices Act, 1898. As an ecclesiastical tribunal, the committee does not claim to define doctrines, etc., with the authority of a Church Council; their Lordships' office is to interpret the laws and formularies of the Church. In dealing with questions relating to doctrine of ritual, their Lordships are guided by the results of historical investigation, and for this reason previous decisions of the Board may be reconsidered, if they proceeded on historical statements which have since been corrected or supplemented (*Read v. Bishop of Lincoln*, cited above).

Consolidation of Appeals.—The committee will consolidate appeals at any stage, if it appears convenient that they should be heard together. When leave is given to consolidate, the appeals may usually be heard on one printed case on each side and a single appendix. For the terms on which the order is made, see *Hiddingh v. Denysen*, 1886, 12 A. C. 107.

Prolongation of Patents.—Besides their powers as an appellant tribunal, the Judicial Committee were formerly empowered to decide on applications for the prolongation of patents for inventions. This jurisdiction was given in 1835, and was preserved by the Patents Act, 1883, but it has been transferred to the High Court by sec. 18 of the Patents Act, 1907. See PATENTS, Vol. X. p. 608.

Proceedings on Appeals.—When an appellant has obtained leave from the local Court or from His Majesty in Council to enter his appeal, his first duty is to obtain a transcript of the proceedings and evidence, together with the reasons given for the judgment appealed from. If the appeal is from an appellate Court, the reasons given for the judgment of the Court of first instance should be included in the transcript. The costs of preparing the transcript are costs of the appeal, but they are incurred in the Court below, and must, if necessary, be taxed there. Transcripts may be printed abroad; in this case fifty copies must be sent to England, two of which must be certified under the seal of the Court from which they come. When the transcript is forwarded in writing, the appellant may call on the registrar to cause it, or such part thereof as may be necessary, together with such parts as the respondent may require, to be printed. By the Order in Council of June 13, 1853, a time is fixed within which the transcript must be printed. If no effectual steps are taken for the prosecution of the appeal within the time fixed, it stands dismissed without further order.

When the transcript arrives, or earlier if he sees occasion, the appellant prepares his petition of appeal, which ought to contain merely an abstract of the proceedings below, with a conclusion praying that His Majesty will be pleased to order that the judgment appealed from may be reversed or varied. The petition of appeal is not usually printed.

The petition of appeal having been lodged, the agents for the respondent should enter a formal appearance, by giving notice in writing to the registrar. If different respondents are represented by different agents, all should enter formal appearance; but they are not justified in incurring the expense of separate counsel, etc., if the questions in the appeal are such as can be argued on behalf of all the respondents together. If the respondent fails to appear, the appellant may obtain an order for a summons to appear within two months; and, if at the end of that time no appearance has been entered, the appellant is entitled to a peremptory order calling on the respondent to appear within six weeks; at the end of which time, if the respondent is still in default, the appellant will be allowed to set down the appeal *ex parte*.

The printed cases of the appellant and respondent contain an abstract of the facts out of which the appeal has arisen, together with a short statement of the reasons offered by the parties for reversing or affirming the judgment of the Court below. After both cases are lodged, the agents exchange copies; but neither party can obtain a sight of his adversary's case until he lodges his own. Where an appendix of documents referred to in the case is required, it should be a joint-appendix; a separate appendix is not permitted, unless on an affidavit of the refusal of the opposite party to unite in a joint-appendix. A party who has lodged his case is entitled to an order requiring his opponent to lodge his case within a month, and, at the end of that time, to a peremptory order requiring the delivery of the case within a fortnight. When both cases are lodged, the appeal is set down for hearing; or, if one party is in default, the other party may set it down *ex parte*.

Petitions for appearance orders, case orders, and orders of consolidation, or for directions in matters of procedure, are addressed to the Right Hon. the Lords of the Judicial Committee. The order made on such a petition is a committee order, and is issued from the Council Office as soon as the matter is disposed of at the Board. On the other hand, petitions for leave to appeal, for revivor, for leave to intervene or add parties, or for the dismissal of the appeal, are addressed to the King's most excellent Majesty in Council, and the committee humbly advise His Majesty to make the appropriate order on such a petition at the next Council after the petition has been heard.

The Order in Council of June 13, 1853, directs that the appellant must make application for the printing of the transcript within six months if the appeal comes from any colony, etc., east of the Cape of Good Hope; within three months if it comes from any other part of the King's dominions abroad. If no effectual steps are taken within the time limited, the appeal stands dismissed without further order. Macpherson holds that these provisions have practically superseded the old rule, that the proceedings must be transmitted and the petition of appeal presented within year and day.

Notice having been given to the parties, the appeal comes on for argument. As a general rule, their Lordships will hear two counsel on each side on the hearing of an appeal; one counsel on each side on the hearing of a petition. Where two appellants or respondents are adverse to each other, their cases may be separately heard; but when separate counsel are employed without necessity, only one set of costs will be allowed. Where a difficult question of law arises, their Lordships have sometimes directed the case to be re-argued before a more numerous Board by one counsel on each side.

The committee will hear an argument on any point of law, whether it has been taken in the Court below or not. They will decline to hear any argument on questions of fact which might have been, and have not been, raised in the Court below. The materials before the committee are those contained in the printed record. If a party wishes to refer to documents or facts not adduced in the Court below, he should, before the hearing, present a petition, addressed to the Lords of the Committee, and the application should be made on notice to the other side. The committee is empowered to take evidence; and in matters specially referred, *e.g.* on the hearing of a petition for the extension of a patent, witnesses are called and sworn as before the Courts of law. Where it appears that the Court below has not made sufficient inquiry into the facts, the hearing of the appeal may be directed to stand over until the Court below has completed its inquiry, and (if necessary) altered or supplemented its judgment in accordance with the facts. The committee may refer any matter to be examined and reported on by the registrar, or by some other person specially appointed. In some old cases, the committee took the opinion of foreign jurists on questions of law; but it is not likely that these precedents will be relied on or followed at the present day.

When the argument is concluded, their Lordships proceed, either at once or after an interval of time, to deliver their judgment, *i.e.* to state the reasons for which they will advise His Majesty to allow or dismiss the appeal. It is not now customary to give any information as to the concurrence or dissent of individual members of the Board; there is only one judgment, delivered by one member on behalf of the committee. In the formal report to His Majesty, after reciting the substance of the petition of appeal, their Lordships humbly report as their opinion that the judgment appealed from ought to be affirmed, reversed, or varied, and that the appeal ought to be dismissed or allowed. When the decree of the Court below is substantially varied, the appeal is allowed; but in affirming a decree, their Lordships may make amendments in point of form for the sake of greater clearness. When accounts are to be taken, or further inquiries made, the case is remitted to the Court below, with a declaration of the rights of the parties. The report concludes by stating that if His Majesty in Council is pleased to approve of what is therein recommended, their Lordships direct that the costs of the appeal are to be dealt with as they may indicate. As a general rule, the direction is that the costs are to be paid by the unsuccessful party; but where, for example, a successful appellant is to blame, the direction will be that the parties do bear their own costs. If no direction were given as to costs, the effect would probably be to give the successful party a right to his costs. See as to successful appellants, the Order in Council of June 13, 1853.

When judgment has been delivered, the registrar prepares a draft Order in Council, embodying the formal report of the committee. It is not now the practice to require the parties to submit minutes of the order to be made; but in cases of difficulty the draft order is communicated to the agents on both sides, and any suggestions made by counsel are considered by the registrar, or, if necessary, by the committee. When the draft order has been approved by His Majesty in Council, it is binding on the parties, and on the judicial or executive officers to whom it is addressed. A party may apply by petition addressed to His Majesty in Council, to have the final order on an appeal varied or

rescinded, but such applications are permitted only for the correction of mistakes, and the petition will be dismissed if it appears that what is asked for is really a re-hearing of the case. Where the Court below has made a mistake in carrying out the King's Order, a supplemental appeal may be permitted (see *Rodger v. Comptoir d'Escompte de Paris*, 1869, 7 Moo. P. C. N. S. 314; L. R. 2 P. C. 393).

It is usual to insert in the King's Order the exact sum which the unsuccessful party is to pay to the other party for his costs of the appeal incurred in England. As soon as judgment has been delivered, a committee order is issued directing that the costs of the successful party are to be taxed by the registrar, and an appointment is made for that purpose, due notice being given to both sides. Where the taxation proceeds as between party and party, the costs allowed will be the costs reasonably incurred in placing the party's case before the committee; fees to counsel, for example, are allowed at the amount usually paid in the Privy Council; if an agent is instructed to pay a special fee to secure the attendance of distinguished counsel, the charge will be allowed as between solicitor and client, but disallowed in part as between party and party. The charges for printing, and for the necessary attendances, etc., are allowed in accordance with the Schedule of Fees as sanctioned by the Orders in Council. A party may obtain an order for the taxation of his own costs as between solicitor and client. A party who changes his agent must pay the costs of his former agent, as between solicitor and client, before the name of the new agent is entered on the record. The rules of taxation observed in the Privy Council have not been reduced to a systematic form; and the precedents which have found their way into books of practice are not always to be relied on. Full information on any doubtful point may be obtained from the clerks in the Judicial Department of the Council Office. In ecclesiastical cases, the costs are taxed by the Registrar of His Majesty in Ecclesiastical Cases. A party who is dissatisfied with the decision of the registrar may petition the committee to review the taxation; but it appears that no such petition has been presented within the memory of any of the existing officials.

[*Authorities.*—Works cited in the foregoing article, and Privy Council Reports of Acton, Knapp, Moore, etc.]

Privy Purse.—The Privy Purse is the amount set apart in the Civil List (see LIST, CIVIL) for the private and personal use of the Sovereign. Under the present arrangement it is £110,000 per annum.

By the Private Property of Sovereign Act, 1880, 39 & 40 Geo. III. c. 88, s. 1, it is provided that lands theretofore purchased by the Sovereign, or thereafter to be purchased by him, his heirs, or successors, out of any moneys issued and applied for the use of his or their privy purse should belong to him.

By sec. 10 of that Act it is also provided (*inter alia*) that personal estate consisting of money issued or applied for the use of the privy purse should be subject to disposition by will in writing, and liable to all debts payable out of the privy purse. See SOVEREIGN.

Privy Seal and Privy Signet.—As to the Privy Seal, see LORD PRIVY SEAL.

The Signet, or Privy Signet, is the principal of the three seals (the others being a lesser seal, and a small seal called the *cachet*), which are

delivered to each of the Secretaries of State on their appointment, and by the delivery of which they are appointed to their offices. It is engraved with the Royal Arms with supporters, the others only being engraved with the Arms.

The Secretaries of State, as the officials through whom communications on public business take place between the Sovereign and subject, are historically connected with the King's clerk, or secretary, who appears first as an officer of that name in the reign of Henry III., separate from the Chancellor and the clerks of his staff. He was appointed by the delivery of the Signet, and he had an office called the Signet Office, with a number of persons holding the office of Clerks of the Signet. Through this office all Acts of State which required the Signet passed; but the business had come to be managed by the Home Office, and the clerks were abolished in 1851 (14 & 15 Vict. c. 82).

The use of the Signet as part of the preliminaries to the passing of grants under the Great Seal was rendered unnecessary by the same Act. See LORD PRIVY SEAL.

It is used in the Foreign Office upon instruments which authorise the Great Seal to be affixed to powers to treat, and ratifications of treaties pass under the Signet as well as the Sign Manual, and are countersigned by the Secretary of State. In the Colonial Office it is affixed to commissions and instructions. In the Home Office and War Office it is not used.

[*Authority.*—Anson, *Law and Custom of the Constitution.*]

Privy Tithes.—See TITHES.

Prize Fight.—A fight between two men with ungloved hands for money, where the object of the contest is to subdue each other by blows, is an unlawful assault (*R. v. Coney*, 1882, 8 Q. B. D. 534).

Persons who attend such a fight are guilty of unlawful assembly (*R. v. Billingham*, 1820, 2 Car. & P. 234), and persons who are present to aid and abet a fight, otherwise than as mere spectators, are liable for the assault (*R. v. Coney*, *ubi supra*). The somewhat narrow distinctions between prize fights and sparring or boxing contests are discussed under BOXING MATCH; and see DUEL.

Prize (or Prize of War).

TABLE OF CONTENTS.

Meaning	655	Prize Bounty	660
Prize Courts	655	Ransom	661
Procedure	657	Offences against Prize Law	661
Vessels liable to Detention	658	Limitation of Action	661
Captors' Duty to secure Evidence	658	Resistance by Non-Commissioned Vessels	662
Monition and Adjudication	659	Pre-emption	662
Claim	659	Hague Convention as to International Prize Court	662
Powers of Prize Court	659	Authorities	673
Conjunct Capture with Ally	660		
Joint Captures	660		
Recapture	660		

Meaning.—The term prize, or prize of war, in international law denotes property captured at sea by a belligerent. As to captures on land, see the article BOOTY OF WAR.

Prize Courts.—In most countries tribunals are specially created *ad hoc* on the outbreak of war to adjudicate upon captures.

It was formerly usual in Great Britain on the outbreak of war to enact the necessary provisions concerning naval prize.

The whole subject, however, has now been regulated by the Naval Prize Act, 1864, 27 & 28 Vict. c. 25, which also contains provisions respecting the competent Courts.

"Prize Courts," observed Sir Henry Maine, "are sometimes called International Courts, and no doubt modern international law does to some extent recognise them; but in principle a Prize Court is a Court established by a positive municipal law, and it is intrusted by the Sovereign of the State in which it is established with the duty of deciding whether ship or cargo is prize or no prize. In the abstract, its object is to satisfy the conscience of the Sovereign that the captures made by his subjects are valid captures. He is always, in theory, supposed to be responsible for them" (*International Law*, p. 96).

A Convention was agreed to at The Hague Conference in 1907 relative to the establishment at The Hague of an International Prize Court with appellate jurisdiction in prize cases from the decisions of the National Prize Courts. The establishment of such an international tribunal constitutes an epoch-making event in the history of the law of nations, and one which is calculated to have far-reaching effects upon the national prize law of Great Britain. The text of the Convention relative to the establishment of an International Prize Court is appended to this article (see *post*, p. 662). It must, however, be recollected that before the provisions of the Convention can be adopted by this country considerable legislative changes and modifications in the existing municipal law of prize will be necessitated. An International Conference on maritime law will, it is anticipated, be held in London during the present year (1908) for the purpose of an investigation and elucidation of the subject in order if possible to attain agreement between the maritime Powers to be enunciated in the form of an international code of Prize Law.

Under the Naval Prize Act, 1864, the High Court of Admiralty of England (*i.e.* since the Judicature Act, 1873, the Probate, Divorce, and Admiralty Division of the High Court of Justice) and every Court of Admiralty or Vice-Admiralty or other Court exercising Admiralty jurisdiction in His Majesty's dominions, "for the time being authorised to take cognisance of and judicially proceed in matters of prize," is a Prize Court (s. 3).

In order to make further provision for the establishment of Prize Courts, the Prize Courts Act, 1894, 57 & 58 Vict. c. 39, provided that any commission, warrant, or instructions from His Majesty the King or the Admiralty for the purpose of commissioning or regulating the procedure of a Prize Court in a British possession may notwithstanding the existence of peace be issued at any time with a direction that the Court shall act only upon such proclamation as thereafter mentioned being made in the possession (s. 2 (1)).

Where any such commission, warrant, or instructions have been issued, then, subject to instructions from His Majesty, the Vice-Admiral of such possession may, when satisfied by information from a Secretary of State, or otherwise, that war has broken out between His Majesty and any foreign State, proclaim that war has so broken out, and thereupon the said commission, warrant, and instructions shall take effect as if the same had been issued after the breaking out of such war, and such foreign State were named therein (s. 2 (2)).

The said commission and warrant may authorise either a Vice-Admiralty Court or a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict. c. 27, to act as a Prize Court, and may establish a Vice-Admiralty Court for that purpose (s. 2 (3)).

The commission, warrant, or instructions may be revoked or altered from time to time (s. 2 (4)).

A Court duly authorised to act as a Prize Court during any war is empowered after the conclusion of the war to continue so to act in relation to, and finally dispose of, all matters and things which arose during the war, including all penalties and forfeitures incurred during the war (s. 2 (5)).

The Admiralty Division of the High Court of Justice has jurisdiction throughout His Majesty's dominions as a Prize Court (see *ibid.*, s. 4). An appeal lies to the Judicial Committee of the Privy Council from any order or decree of a Prize Court as of right in the case of a final decree, and in other cases with the leave of the Court making the order or decree (Naval Prize Act, 1864, s. 5).

The Judicial Committee of the Privy Council have jurisdiction to hear and report on any appeal in prize cases, and may therein exercise all such powers as for the time being appertain to them in respect of appeals from any Court of Admiralty jurisdiction, and all such powers as were under the Act vested in the High Court of Admiralty, and all such powers as were formerly exercised by the Commissioners of Appeal in Prize Causes (*ibid.*, s. 6).

Procedure.—The Prize Courts Act, 1894, 57 & 58 Vict. c. 39, empowers the King in Council to make rules of Court for regulating (subject to the provisions of the Naval Prize Act, 1864) the procedure and practice of Prize Courts, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the Courts, and the costs, charges, and expenses to be allowed to the practitioners therein (s. 3 (1)).

Every rule so made, wherever made, is to take effect at the time therein mentioned, and must be laid before both Houses of Parliament, and kept exhibited in a conspicuous place in each Court to which it relates (*ibid.*).

The Naval Prize Act, 1864, imposes a time limit for appeals to the Privy Council in prize cases, sec. 8 providing that in every such appeal the usual inhibition shall be extracted from the Registry of His Majesty in Prize Appeals within three months after the date of the order or decree appealed from if the appeal be from the High Court, and within six months after that date if it be from a Vice-Admiralty Prize Court, though the Judicial Committee may on sufficient cause shown allow the inhibition to be extracted and the appeal to be prosecuted after the expiration of the respective periods aforesaid.

Every ship taken as prize and brought into port within the jurisdiction of a Prize Court must forthwith and without bulk broken be delivered up to the marshal of the Court, or to the principal officer of customs at the port if there be no marshal, and the ship is to remain in the custody of the marshal or of such officer subject to the orders of the Court (s. 16). These provisions as to the custody of the ship do not, however, apply to ships of war taken as prize (s. 22).

All these provisions apply not only to ships, but also *mutatis*

mutandis to goods taken as prize on board ship, and the Court may direct such goods to be unladen, inventoried, and warehoused (s. 31).

Vessels liable to Detention.—The following vessels are liable in time of war to detention by British war vessels:—

1. Any enemy vessel, irrespective of her destination or cargo.
2. Any British vessel or vessel of an ally, trading with or acting in the service of the enemy.
3. Any neutral vessel engaged in—
 - (a) Carriage of contraband;
 - (b) Acting in the service of the enemy;
 - (c) Breach of blockade.
4. Any vessel of whatever nationality—
 - (a) Resisting visit and search;
 - (b) Sailing under neutral convoy which resists;
 - (c) Sailing under enemy convoy;
 - (d) Deficient in ship's papers.

(Holland, *Manual of Naval Prize Law*, art. 9.)

Captors' Duty to secure Evidence.—The captors must, with all possible speed after the ship is brought into port, bring the ship papers into the Registry of the Court (Naval Prize Act, 1864, s. 17).

The term "ship papers" is defined by the Act as including all books, passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings delivered up or found on board a captured ship (*ibid.*, s. 2).

The officer in command or one of the chief officers of the capturing ship, or some other person who was present at the capture and saw the ship papers delivered up or found on board is required to make oath that they are brought in as they were taken, without fraud, addition, subduction, or alteration, or else shall account on oath to the satisfaction of the Court for the absence or altered condition of the ship papers or any of them (*ibid.*, s. 17).

Where no ship papers are delivered up or found on board the captured ship an affidavit is to be made to that effect (*ibid.*).

"The first duty," says Professor Holland, "of commanders of vessels in His Majesty's service is to secure all the papers belonging to the vessel, as well as those which are usually denominated 'ship papers,' and which relate only to the vessel and cargo, as all other papers of whatever description which may be either delivered up or found on board."

The vessel's papers as soon as secured should be arranged and numbered in consecutive order, care being taken that the inclosures are not separated from their envelopes. The importance of securing all the vessel's papers is manifest, inasmuch as the evidence to acquit or condemn the prize must, in the first instance, come solely from the prize herself, namely, from the papers on board and from the depositions on oath of the principal persons belonging to the prize (*Manual of Naval Prize Law*, art. 240).

Moreover, immediately upon going on board the prize officer should draw up an inventory of the stores, furniture, and cargo of the vessel, so far as can be ascertained without disturbing the stowage. He should invite the master to assist him in drawing up this inventory, and should in all cases deliver a copy thereof signed by himself to the master (*ibid.*, art. 305).

Lastly, the captain of the capturing or detaining ship must cause the principal officers of the vessel detained, and such other persons of the crew as he shall think fit, to be examined as witnesses in the Prize Court to prove to whom the vessel and cargo belong; and he must send to the Court all passports, custom-house clearances, log-books, and all other ship's papers which shall be found on board, without suffering them to be on any pretence secreted or withheld (*ibid.*, art. 248).

The Naval Prize Act, 1864, requires the captors with all practicable speed after the captured ship is brought into port to bring three or four of the principal persons belonging to her before the judge of the Court or some person authorised in that behalf by whom they are to be examined on oath on the Standing Interrogatories (s. 19). The preparatory examinations on the Standing Interrogatories must, if possible, be concluded within five days from the commencement thereof (*ibid.*).

Monition and Adjudication.—As soon as the affidavit as to ship papers is filed a monition must be issued returnable within twenty days from the service thereof citing all persons in general to show cause why the captured ship should not be condemned (*ibid.*, s. 18). After the return of the monition the Court must, on production of the preparatory examinations and ship papers, proceed with all convenient speed either to condemn or to release the captured ship (s. 20). Where, on production of the preparatory examinations and the ship papers it appears to the Court to be doubtful whether the captured ship is good prize or not, the Court has power to direct further proof to be adduced either by affidavit or by examination of witnesses, with or without pleadings, or by production of further documents; and on such further proof being adduced the Court must with all convenient speed proceed to adjudication (s. 21). The captors may include in one adjudication any number, not exceeding six, of armed ships not exceeding one hundred tons each, taken within three months next before institution of proceedings (s. 30).

Claim.—At any time before final decree made in the cause any person claiming an interest in the ship may enter in the registry of the Court a claim verified on oath. Within five days after entering the claim the claimant must give security for costs in the sum of £60, but the Court has power to enlarge the time for giving security, or to direct security to be given in a larger sum if the circumstances appear to require it (*ibid.*, s. 23).

The Court may direct the captured ship to be appraised (s. 24), and after appraisalment the Court may, if it thinks fit, direct that the captured ship be delivered up to the claimant on his giving security to the satisfaction of the Court to pay to the captors the appraised value thereof in case of condemnation (s. 25).

The Court may at any time, if it thinks fit, on account of the condition of the captured ship, or on the application of a claimant, order that the ship be appraised, and be sold, and may on or after condemnation, make an order for appraisalment and sale (ss. 26, 27). The sale is made by or under the superintendence of the Marshal of the Court or of the person having the custody of the captured ship (s. 28). As to the disposal of the proceeds of sale, see sec. 29.

Powers of Prize Court.—The powers of the Prize Court are to condemn as lawful prize captures properly made; to order the restoration

of property wrongfully captured, and award damages against the captor; and to inflict punishment in the special cases provided for (see *infra*).

Conjunct Capture with Ally.—Jurisdiction is also given to a Prize Court by the Naval Prize Act, 1864, as to ships or goods taken by naval or naval and military forces while acting in conjunction with allied forces, and the Court is empowered upon condemnation to apportion the due share of the proceeds to the allied Power (s. 35).

Joint Captures are provided for under sec. 36 of the same Act.

Recapture.—It is the duty of a commander, if possible, to rescue any British vessel which he may find attacked or captured by the enemy.

If he succeed in effecting the rescue of such a vessel, he may either at once send her in for adjudication, or, at his option, unless she shall have been already carried into an enemy's port, or set forth or used by the enemy as a ship of war, allow her to prosecute her voyage and unlade and dispose of her cargo.

Upon adjudication the Prize Court will order the vessel and cargo to be restored to their respective owners upon payment by them of prize salvage (Holland, *Manual*, arts. 261-263).

The prize salvage which will be awarded to the recaptors for the recapture of any British vessel before she has been actually carried into an enemy's port, is one-eighth part of the value of the prize; or, in case the recapture has been made under circumstances of special difficulty or danger, a sum not exceeding one-fourth part of the value (Naval Prize Act, 1864, s. 40).

Where a ship belonging to a British subject, after being taken as prize by the enemy, is retaken from the enemy by any of His Majesty's ships of war, she may, with the consent of the recaptors, prosecute her voyage, and it is not necessary for the recaptors to proceed to adjudication till her return to a port of the United Kingdom (*ibid.*, s. 41).

The master or owner or his agent may, with the consent of the recaptors, unload and dispose of the goods on board the ship before adjudication (*ibid.*).

In case the ship does not within six months return to a port of the United Kingdom the recaptors may nevertheless institute proceedings against the ship or goods in the High Court, and the Court may thereupon award prize salvage as aforesaid to the recaptors, and may enforce payment thereof either by warrant of arrest against the ships or goods or by monition and attachment against the owner (*ibid.*).

If a commander recapture from the enemy a neutral vessel, which would not have been liable to condemnation in the Prize Court of the enemy, he is not entitled to salvage; and should, without delay and without taking ransom, set her free to prosecute her voyage (*War Onskan*, 2 Rob. C. 299; see *Manual*, art. 270).

Prize Bounty.—Part V. of the Naval Prize Act provides for the distribution of prize bounty among the officers and crew of His Majesty's ships of war present at an engagement with the enemy. If in relation to any war His Majesty is pleased to declare by Proclamation or Order in Council his intention to grant prize bounty to the officers and crews of his ships of war, then such of the officers and crews of any of His

Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of His Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement (s. 42). The amount of prize bounty is to be ascertained by decree of a Prize Court (s. 43). As to the mode of payment of the prize bounty so awarded see *ibid.*, s. 44.

Ransom.—The King is empowered by sec. 45 of the same Act by Order in Council to prohibit, regulate, or allow the ransom of British ships taken as prize by the enemy.

Offences against Prize Law.—On proof of any offence against the Law of Nations, or against any Act relating to naval discipline, or against any Order in Council or Royal Proclamation, or of any breach of instructions relating to prize, or any act of disobedience to the orders of the Lords of the Admiralty, or to the command of a superior officer, committed by the captors in relation to their prize, or in relation to any person on board thereof, the Court may on condemnation reserve the prize to His Majesty's disposal, notwithstanding any grant that may have been made in the captor's favour.

Sec. 14 of the Foreign Enlistment Act, 1870, 33 & 34 Vict. c. 90, thus provides for the restoration of illegal prize brought into British ports:—If, during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned or despatched, or the force of which may have been augmented contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor or any agent of the captor, or by any person having come into possession thereof, with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorised in that behalf by the Government of the foreign State to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the Court shall, on due proof of the facts, order such prize to be restored.

The Naval Prize Act, 1864, also provides for the punishment of the masters of merchant vessels sailing under the convoy of British warships who disobey any signal, instruction, or command of the commander of the convoy, or who, without leave, desert the convoy. Such an offence is punishable with imprisonment for one year, together with a fine not exceeding £500 (s. 46).

Limitation of Actions.—Any action or proceeding against any person acting under the authority or in the execution or in pursuance of the Naval Prize Act, 1864, for any alleged irregularity or trespass or other act or thing done or omitted by him under the Act will not lie unless notice in writing (specifying the cause of action or proceeding) is given by the intending plaintiff or prosecutor to the intended defendant one month at least before the commencement of the action or proceeding, nor unless the action or proceeding is commenced within six months next after the act or thing complained of is done or omitted, or in case of a continuation of damage within six months next after the doing of such damage has ceased (*ibid.*, s. 51).

Any such action or proceeding against any person in His Majesty's naval service or in the employment of the Admiralty can only be brought or instituted in the United Kingdom (*ibid.*).

Resistance by Non-Commissioned Vessels.—"Non-commissioned vessels," said the late Mr. W. E. Hall, "have a right to resist when summoned to surrender to public ships or privateers of the enemy. The crews, therefore, which make such resistance have belligerent privileges; and it is a natural consequence of the legitimacy of their acts that if they succeed in capturing their assailant the capture is a good one for the purpose of changing the ownership of the property taken and of making the enemy prisoners of war." By some writers it is asserted that a non-commissioned ship has also a right to attack. "If there was ever anything to be said for this view, and the weight of practice and of legal authority was always against it, there can be no question that it is too much opposed to the whole bent of modern ideas to be now open to argument" (*International Law*, 5th ed., 1904, p. 530).

In any case prizes taken by ships other than ships of war upon condemnation become droits of Admiralty (see Naval Prize Act, 1864, s. 39; see also the article ADMIRALTY, THE, Vol. I. p. 192).

Pre-emption.—The purchase by the Admiralty for the public service of stores on board foreign ships is provided for by sec. 38 of the Naval Prize Act, 1864 (see the article PRE-EMPTION, INTERNATIONAL).

Hague Convention as to International Prize Court.—The following is a translation of the text of the Convention which was concluded at The Hague in 1907.

CONVENTION RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT.

His Majesty the German Emperor, King of Prussia; the President of the United States of America; the President of the Argentine Republic; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of the Belgians; the President of the Republic of Bolivia; the President of the Republic of the United States of Brazil; His Royal Highness the Prince of Bulgaria; the President of the Republic of Chile; His Majesty the Emperor of China; the President of the Republic of Columbia; the Provisional Governor of the Republic of Cuba; His Majesty the King of Denmark; the President of the Dominican Republic; the President of the Republic of Ecuador; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of the Hellenes; the President of the Republic of Guatemala; the President of the Republic of Haïti; His Majesty the King of Italy; His Majesty the Emperor of Japan; His Royal Highness the Grand Duke of Luxemburg, Duke of Nassau; the President of the United States of Mexico; His Royal Highness the Prince of Montenegro; the President of the Republic of Nicaragua; His Majesty the King of Norway; the President of the Republic of Panamá; the President of the Republic of Paraguay; Her Majesty the Queen of the Netherlands; the President of the

Republic of Peru; His Imperial Majesty the Shah of Persia; His Majesty the King of Portugal and of the Algarves, etc.; His Majesty the King of Roumania; His Majesty the Emperor of all the Russias; the President of the Republic of Salvador; His Majesty the King of Servia; His Majesty the King of Siam; His Majesty the King of Sweden; the Swiss Federal Council; His Majesty the Emperor of the Ottomans; the President of the Oriental Republic of Uruguay; the President of the United States of Venezuela:

Animated by the desire to settle in an equitable manner the differences which sometimes arise in the course of a naval war in connection with the decisions of National Prize Courts;

Considering that, if these Courts are to continue to exercise their functions in the manner determined by national legislation, it is desirable that in certain cases an appeal should be provided under conditions conciliating, as far as possible, the public and private interests involved in matters of prize;

Whereas, moreover, the institution of an International Court, whose jurisdiction and procedure would be carefully defined, has seemed to be the best method of attaining this object;

Convinced, finally, that in this manner the hardships consequent on naval war would be mitigated; that, in particular, good relations will be more easily maintained between belligerents and neutrals and peace better assured;

Desirous of concluding a Convention to this effect, have appointed the following as their plenipotentiaries:

[Then follow the names of plenipotentiaries.]

Who, after depositing their full powers, found in good and due form, have agreed upon the following provisions:—

PART I.—GENERAL PROVISIONS.

Article I.—The validity of the capture of a merchant ship or its cargo is decided before a Prize Court in accordance with the present Convention when neutral or enemy property is involved.

Article II.—Jurisdiction in matters of prize is exercised in the first instance by the Prize Courts of the belligerent captor.

The judgments of these Courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

Article III.—The judgments of National Prize Courts may be brought before the International Prize Court—

1. When the judgment of the National Prize Courts affects the property of a neutral Power or individual;

2. When the judgment affects enemy property and relates to—

(a) Cargo on board a neutral ship;

(b) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

(c) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a Convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the National Court can be

based on the ground that the judgment was wrong either in fact or in law.

Article IV.—An appeal may be brought—

1. By a neutral Power, if the judgment of the National Tribunals injuriously affects its property or the property of its nationals (Article III. (1)), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article III. (2) (b));

2. By a neutral individual, if the judgment of the National Court injuriously affects his property (Article III. (2)); subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy Power, if the judgment of the National Court injuriously affects his property in the cases referred to in Article III. (2), except that mentioned in paragraph (b).

Article V.—An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the National Court. Persons so entitled may appeal separately to the extent of their interest.

The same rule applies in the case of persons belonging either to neutral States or to the enemy who derive their rights from and are entitled to represent a neutral Power whose property was the subject of the decision.

Article VI.—When, in accordance with the above Article III., the International Court has jurisdiction, the National Court cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

If the National Courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

Article VII.—If a question of law to be decided is covered by a Treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said Treaty.

In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognised rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply equally to questions relating to the order and mode of proof.

If, in accordance with Article III. (2) (c), the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

Article VIII.—If the Court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

If the national Court pronounced the capture to be null, the Court can only be asked to decide as to the damages.

Article IX.—The Contracting Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

PART II.—CONSTITUTION OF THE INTERNATIONAL PRIZE COURT.

Article X.—The International Prize Court is composed of Judges and Deputy Judges, who will be appointed by the Contracting Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these Judges and Deputy Judges shall be made within six months after the ratification of the present Convention.

Article XI.—The Judges and Deputy Judges are appointed for a period of six years reckoned from the date on which the notification of their appointment is received by the Administrative Council established by the Convention for the Pacific Settlement of International Disputes of the 29th July 1899. Their appointments can be renewed.

Should one of the Judges or Deputy Judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

Article XII.—The Judges of the International Prize Court are all equal in rank and have precedence according to the date on which the notification of their appointment was received (*Article XI.* paragraph 1), and if they sit by rota (*Article XV.* paragraph 2), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.

The Deputy Judges when acting are assimilated to the Judges. They rank, however, after them.

Article XIII.—The Judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

Before taking their seat, the Judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.

Article XIV.—The Court is composed of fifteen Judges; nine Judges constitute a quorum.

A Judge who is absent or prevented from sitting is replaced by the Deputy Judge.

Article XV.—The Judges appointed by the following Contracting Powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

The Judges and Deputy Judges appointed by the other Contracting Powers sit by rota as shown in the Table annexed to the present Convention; their duties may be performed successively by the same

person. The same Judge may be appointed by several of the said Powers.

Article XVI.—If a belligerent Power has, according to the rota, no Judge sitting in the Court, it may ask that the Judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the Judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the Judge appointed by the other belligerent.

Article XVII.—No Judge can sit who has been a party, in any way whatever, to the sentence pronounced by the National Courts, or has taken part in the case as counsel or advocate for one of the parties.

No Judge or Deputy Judge can during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever.

Article XVIII.—The belligerent captor is entitled to appoint a naval officer of high rank to sit as Assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

Article XIX.—The Court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

Article XX.—The Judges on the International Prize Court are entitled to travelling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins per diem.

These payments are included in the general expenses of the Court dealt with in Article XLVII., and are paid through the International Bureau established by the Convention of the 29th July 1899.

The Judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

Article XXI.—The seat of the International Prize Court is at The Hague and it cannot, except in the case of *force majeure*, be transferred elsewhere without the consent of the belligerents.

Article XXII.—The Administrative Council fulfils, with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration, but only Representatives of Contracting Powers will be members of it.

Article XXIII.—The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The Secretary-General of the International Bureau acts as Registrar.

The necessary secretaries to assist the Registrar, translators and shorthand writers are appointed and sworn in by the Court.

Article XXIV.—The Court determines which language it will itself use and what languages may be used before it, but the official language of the National Courts which have had cognizance of the case may always be used before the Court.

Article XXV.—Powers which are concerned in a case may appoint

special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

Article XXVI.—A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a Court of Appeal or a High Court of one of the Contracting States, or a lawyer practising before a similar Court, or lastly, a professor of law at one of the higher teaching centres of those countries.

Article XXVII.—For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

PART III.—PROCEDURE IN THE INTERNATIONAL PRIZE COURT.

Article XXVIII.—An appeal to the International Prize Court is entered by means of a written declaration made in the National Court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at 120 days, counting from the day the decision is delivered or notified (Article II., paragraph 2).

Article XXIX.—If the notice of appeal is entered in the National Court, this Court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.]

If the notice of appeal is sent to the International Bureau, the Bureau will immediately inform the National Court when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it enforce the rights it enjoys under Article IV., paragraph 2.

Article XXX.—In the case provided for in Article VI., paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.

Article XXXI.—If the appellant does not enter his appeal within the period laid down in Articles XXVIII. or XXX., it shall be rejected without discussion.

Provided that he can show that he was prevented from so doing by

force majeure, and that the appeal was entered within sixty days after the circumstances which prevented him entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

Article XXXII.—If the appeal is entered in time, a certified copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

Article XXXIII.—If, in addition to the parties who are before the Court, there are other parties concerned who are entitled to appeal, or if, in the case referred to in Article XXIX., paragraph 3, the Government who has received notice of an appeal has not announced its decision, the Court will await before dealing with the case the expiration of the period laid down in Articles XXVIII. or XXX.

Article XXXIV.—The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

Article XXXV.—After the close of the pleadings, a public sitting is held on a day fixed by the Court.

At this sitting the parties state their view of the case both as to the law and as to the facts.

The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on their own initiative, in order that supplementary evidence may be obtained.

Article XXXVI.—The International Court may order the supplementary evidence to be taken either in the manner provided by Article XXVII., or before itself, or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

Article XXXVII.—The parties are summoned to take part in all stages of the proceedings and receive certified copies of the Minutes.

Article XXXVIII.—The discussions are under the control of the President or Vice-President, or, in case they are absent or cannot act, of the senior Judge present.

The Judge appointed by a belligerent party cannot preside.

Article XXXIX.—The discussions take place in public, subject to the right of a Government who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions and signed by the President and Registrar, and these Minutes alone have an authentic character.

Article XL.—If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party, and the Court gives judgment in accordance with the material at its disposal.

Article XLI.—The Court officially notifies to the parties decrees or decisions made in their absence.

Article XLII.—The Court takes into consideration in arriving at its decision all the facts, evidence, and oral statements.

Article XLIII.—The Court considers its decision in private and the proceedings are secret.

All questions are decided by a majority of the Judges present. If the number of Judges is even and equally divided, the vote of the junior Judge in the order of precedence laid down in Article XII., paragraph 1, is not counted.

Article XLIV.—The judgment of the Court must give the reasons on which it is based. It contains the names of the Judges taking part in it, and also of the Assessors, if any; it is signed by the President and Registrar.

Article XLV.—The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the Court transmits to the National Prize Court the record of the case, together with copies of the various decisions arrived at and of the Minutes of the proceedings.

Article XLVI.—Each party pays its own costs.

The party against whom the Court decides, bears, in addition, the costs of the trial, and also pays 1 per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court, for the purpose of guaranteeing eventual fulfilment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

Article XLVII.—The general expenses of the International Prize Court are borne by the Contracting Powers in proportion to their share in the composition of the Court as laid down in Article XV. and in the annexed Table. The appointment of Deputy Judges does not involve any contribution.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

Article XLVIII.—When the Court is not sitting, the duties conferred upon it by Article XXXII., Article XXXIV., paragraphs 2 and 3, Article XXXV., paragraph 1, and Article XLVI., paragraph 3, are discharged by a delegation of three Judges appointed by the Court. This delegation decides by a majority of votes.

Article XLIX.—The Court itself draws up its own rules of procedure, which must be communicated to the Contracting Powers.

It will meet to elaborate those rules within a year of the ratification of the present Convention.

Article L.—The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the Contracting Powers, which will consider together as to the measures to be taken.

PART IV.—FINAL PROVISIONS.

Article LI.—The present Convention does not apply as of right except when the belligerent Powers are all parties to the Convention.

It is further fully understood that an appeal to the International Prize Court can only be brought by a Contracting Power or the subject or citizen of a Contracting Power.

In the cases mentioned in Article V., the appeal is only admitted when both the owner and the person entitled to represent him are equally Contracting Powers or the subjects or citizens of Contracting Powers.

Article LII.—The present Convention shall be ratified and the ratifications shall be deposited at The Hague as soon as all the Powers mentioned in Article XV. and in the Table annexed are in a position to do so.

The deposit of the ratifications shall take place, in any case, on the 30th June 1909, if the Powers which are ready to ratify furnish nine Judges and nine Deputy Judges to the Court, qualified to validly constitute a Court. If not, the deposit shall be postponed until this condition is fulfilled.

A minute of the deposit of ratifications shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to each of the Powers referred to in the first paragraph.

Article LIII.—The Powers referred to in Article XV. and in the Table annexed are entitled to sign the present Convention up to the deposit of the ratifications contemplated in paragraph 2 of the preceding Article.

After this deposit, they can at any time adhere to it, purely and simply. A Power wishing to adhere, notifies its intention in writing to the Netherland Government, transmitting to it, at the same time, the act of adhesion, which shall be deposited in the archives of the said Government. The latter shall send, through the diplomatic channel, a certified copy of the notification and of the act of adhesion to all the Powers referred to in the preceding paragraph, informing them of the date on which it has received the notification.

Article LIV.—The present Convention shall come into force six months from the deposit of the ratifications contemplated in Article LII., paragraphs 1 and 2.

The adhesions shall take effect sixty days after notification of such adhesion has been received by the Netherland Government, or as soon as possible on the expiration of the period contemplated in the preceding paragraph.

The International Court shall, however, have jurisdiction to deal with prize cases decided by the National Courts at any time after the deposit of the ratifications or of the receipt of the notification of the adhesions. In such cases, the period fixed in Article XXVIII., paragraph 2, shall only be reckoned from the date when the Convention comes into force as regards a Power which has ratified or adhered.

Article LV.—The present Convention shall remain in force for twelve years from the time it comes into force, as determined by Article LIV., paragraph 1, even in the case of Powers which adhere subsequently.

It shall be renewed tacitly from six years to six years unless denounced.

Denunciation must be notified in writing, at least one year before the expiration of each of the periods mentioned in the two preceding paragraphs, to the Netherland Government, which will inform all the other Contracting Powers.

Denunciation shall only take effect in regard to the Power which has notified it. The Convention shall remain in force in the case of the other Contracting Powers, provided that their participation in the appointment of Judges is sufficient to allow of the composition of the Court with nine Judges and nine Deputy Judges.

Article LVI.—In case the present Convention is not in operation as regards all the Powers referred to in Article XV. and the annexed Table, the Administrative Council shall draw up a list on the lines of that Article and Table of the Judges and Deputy Judges through whom the Contracting Powers will share in the composition of the Court. The times allotted by the said Table to Judges who are summoned to sit in rota will be redistributed between the different years of the six-year period in such a way that, as far as possible, the number of the Judges of the Court in each year shall be the same. If the number of Deputy Judges is greater than that of the Judges, the number of the latter can be completed by Deputy Judges chosen by lot among those Powers which do not nominate a Judge.

The list drawn up in this way by the Administrative Council shall be notified to the Contracting Powers. It shall be revised when the number of these Powers is modified as the result of adhesions or denunciations.

The change resulting from an adhesion is not made until the 1st January after the date on which the adhesion takes effect, unless the adhering Power is a belligerent Power, in which case it can ask to be at once represented in the Court, the provision of Article XVI. being, moreover, applicable if necessary.

When the total number of Judges is less than eleven, seven Judges form a quorum.

Article LVII.—Two years before the expiration of each period referred to in paragraphs 1 and 2 of Article LV. any Contracting Power can demand a modification of the provisions of Article XV. and of the annexed Table, relative to its participation in the composition of the Court. The demand shall be addressed to the Administrative Council, which will examine it and submit to all the Powers proposals as to the measures to be adopted. The Powers shall inform the Administrative Council of their decision with the least possible delay. The result shall be at once, and at least one year and thirty days before the expiration of the said period of two years, communicated to the Power which made the demand.

When necessary, the modifications adopted by the Powers shall come into force from the commencement of the fresh period.

In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague, the 18th October 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers designated in Article XV. and in the Table annexed.

ANNEX TO ARTICLE XV.

Distribution of Judges and Deputy Judges by Countries for each Year of the Period of Six Years.

First Year.

Judges.					Deputy Judges.
1. Argentina	.	.	.	.	Paraguay.
2. Colombia	.	.	.	.	Bolivia.
3. Spain	.	.	.	.	Spain.
4. Greece	.	.	.	.	Roumania.
5. Norway	.	.	.	.	Sweden.
6. Netherlands	.	.	.	.	Belgium.
7. Turkey	.	.	.	.	Persia.

Second Year.

1. Argentina	.	.	.	.	Panamá.
2. Spain	.	.	.	.	Spain.
3. Greece	.	.	.	.	Roumania.
4. Norway	.	.	.	.	Sweden.
5. Netherlands	.	.	.	.	Belgium.
6. Turkey	.	.	.	.	Luxemburg.
7. Uruguay	.	.	.	.	Costa Rica.

Third Year.

1. Brazil	.	.	.	.	Santo Domingo.
2. China	.	.	.	.	Turkey.
3. Spain	.	.	.	.	Portugal.
4. Netherlands	.	.	.	.	Switzerland.
5. Roumania	.	.	.	.	Greece.
6. Sweden	.	.	.	.	Denmark.
7. Venezuela	.	.	.	.	Haiti.

Fourth Year.

1. Brazil	.	.	.	.	Guatemala.
2. China	.	.	.	.	Turkey.
3. Spain	.	.	.	.	Portugal.
4. Peru	.	.	.	.	Honduras.
5. Roumania	.	.	.	.	Greece.
6. Sweden	.	.	.	.	Denmark.
7. Switzerland	.	.	.	.	Netherlands.

Fifth Year.

1. Belgium	.	.	.	.	Netherlands.
2. Bulgaria	.	.	.	.	Montenegro.
3. Chile	.	.	.	.	Nicaragua.
4. Denmark	.	.	.	.	Norway.
5. Mexico	.	.	.	.	Cuba.
6. Persia	.	.	.	.	China.
7. Portugal	.	.	.	.	Spain.

Sixth Year.

Judges.	Deputy Judges.
1. Belgium	Netherlands.
2. Chile	Salvador.
3. Denmark	Norway.
4. Mexico	Ecuador.
5. Portugal	Spain.
6. Servia	Bulgaria.
7. Siam	China.

[*Authorities.*—Holland, *A Manual of Naval Prize Law* (issued by authority), Lond., 1888; *The Queen's Regulations and Admiralty Instructions*, 1893; Capt. Johnstone, "Naval Prize in War" (*United Service Magazine*, 1891); Wildman, *The Law of Search, Capture, and Prize*, Lond., 1854; Hazlitt and Roche, *Manual of the Law of Maritime Warfare*, Lond., 1854; Lushington, *Manual of Naval Prize Law*, 1866; Katchenovsky, *Prize Law*, translated by Dr. Pratt, 2nd ed., 1867; De Burgh, *The Elements of Maritime International Law*, Lond., 1868; Calvo, *Le Droit International theorique et pratique*, vols. iv. and v., Paris, 1888; Phillimore, *Commentaries upon International Law*, vol. iii., 3rd ed., Lond., 1879-1889; Twiss, *The Law of Nations in Time of War*, 2nd ed., Lond., 1875, and *Belligerent Right on the High Seas*, Lond., 1884; Hall, *International Law*, 5th ed., Oxford, 1904; Wheaton, *International Law*, 4th Eng. ed., 1904; Oppenheim, *International Law*, vol. ii., "War and Neutrality," Lond., 1906, pp. 196 *et seq.*; Westlake, *International Law*, part ii., "War," Cambridge, 1907, pp. 288 *et seq.*; Smith and Sibley, *International Law as interpreted during the Russo-Japanese War*, 2nd ed., Lond., 1907; Bentwich, *Law of Private Property in War*, Lond., 1907; *Reports of Prize Cases determined in the High Court of Admiralty before the Lords Commissioners of Appeals in Prize Cases, and before the Judicial Committee of the Privy Council from 1745 to 1859*, edited by E. S. Roscoe, 2 vols., Lond., 1905.]

Probate.

TABLE OF CONTENTS.

1. INTRODUCTION	673	4. PROBATE	679
2. THE COURT	675	(i.) In Common Form	681
(i.) The Probate, Divorce, and Admiralty Divi- sion	675	(ii.) In Solemn Form	682
(ii.) Registrars	675	5. ADMINISTRATION WITH THE WILL ANNEXED	684
(iii.) County Court	676	6. SIMPLE ADMINISTRATION	685
(iv.) Appeals	676	(i.) General	685
(v.) Rules	676	(ii.) Limited	686
3. JURISDICTION	677	(iii.) Practice	688

1. INTRODUCTION.

The term "probate" in its strictest sense signifies the copy of the will which is given to the executor, together with a certificate granted under seal of the Court, and signed by one of the registrars, certifying that the will has been proved. This probate or copy of the will constitutes the executor's title to act, the original document being left in the registry. When the two documents differ, and questions of interpreta-

tion arise in Chancery, the Court may look at the original will (see *Havergal v. Harrison*, 1843, 7 Beav. 49; 49 E. R. 980; 64 R. R. 13; *Turner v. Hellard*, 1884, 30 Ch. D. p. 390), at anyrate if there are special circumstances (*Gann v. Gregory*, 1854, 3 De G., M. & G. p. 777; 43 E. R. 305); or may give opportunities for the correction of the probate (*Taylor v. Creagh*, 1857, 8 Ir. Ch. p. 281). In a wider sense the word indicates the process and results of proving a will; and generally the word is used even more freely to denote all matters which come within the purview of the Probate Court. The business of that Court is to secure the proper appointment of the personal—and since 1897 of the real—representatives, *i.e.* of the executor, to carry out the wishes of the testator if there be a will; or of an administrator to distribute the estate according to law if there be an intestacy; and generally to decide all questions as to wills and grants of administration.

For historical reasons, English law has never been capable of the simplicity of Roman law, which made a man's estate devolve in one mass.

In the twelfth century the system of primogeniture was established for the descent of land, such descent being regulated by the common law. From that time till 32 Hen. VIII. c. 1, the heir must succeed to the lands, and no devise of that is possible. In the case of chattels, the Church stepped in, wishing to protect gifts at death to pious uses. The common lawyers allowed the Church Courts exclusive jurisdiction, provided always there were no testamentary gifts of land. The will of chattels and the executor make their appearance together. The executor is common to most parts of Western Europe, but nowhere is of such importance as in England, where he is the favoured creature of the Ecclesiastical Courts, as opposed to the common-law heir (Pollock and Maitland, *History of English Law*, vol. ii. p. 312; art. EXECUTORS AND ADMINISTRATORS). Probate, as we now understand it, that is to say, some process for establishing the validity of a man's will, naturally does not appear until some time after the Church has made good its claim to exclusive jurisdiction in testamentary causes. Selden (*Eccles. Juris. of Testaments*) states there is no instance of such granting of probate earlier than Henry III. The proper ecclesiastical functionary to grant probate in this way was the bishop in whose diocese the goods of the dead man lay. A difficulty arose if the deceased had property in two dioceses, a compromise being eventually arrived at that, if he possessed *bona notabilia*, *i.e.* goods over the value of £5, in two dioceses, neither bishop should grant probate, but only the prerogative Court of the archbishop. The executor soon becomes recognised in the temporal Courts, and he takes his place as the personal representative at common law (art. EXECUTORS AND ADMINISTRATORS).

At first the testator had not full right of disposition, even of personalty; and in the North he did not acquire this full power until 1692, though this had long been the rule in the province of Canterbury. Now, by the Wills Act, 1 Vict. c. 26, full power of disposition over all property, real and personal, is secured to all persons of full age (s. 3).

Administration on intestacy appears somewhat later than the will. The Church used all her influence to secure the making of a will, and the assignment to her of a portion on behalf of the poor; to die intestate in the thirteenth century was to die unconfessed. But if the deceased left no will the next best thing was that the Church should

dispose of his property for the good of his soul (Constitution of Othobo, 1268); the original charter of 1215 contained a proviso to this effect, respect being had to the rights of kinsfolk and creditors. Bracton mentions the claims of friends in the same breath with that of the Church, and no doubt their claims usually were respected. In 1285 (Stat. Westm. 2, c. 19) it was declared the ordinary should be bound to pay the debts of the intestate, just as the executors were; and an early instance of letters of administration occurs in 1313, where the Bishop of Durham intrusts the goods of the intestate to the widow and two friends. In 1357 Stat. 31 Edw. III. c. 11, made this appointment of administrators the rule: such to be the "next and most lawful friends of the dead person." Actions for debt were given both to and against these administrators, but they were still to "dispend" the goods for the soul of the dead. For the subsequent history of the rights of succession on intestacy, see *Carter v. Crawley*, 1681, Ray. T. p. 496; 83 E. R. 259. The Statute of Distributions, 22 & 23 Car. II. c. 10, eventually provided for the distribution of residue after payment of debts amongst the wife, children, and next of kindred.

2. THE COURT.

All this probate work for supervision of the appointment of personal representatives remained in the hands of the ecclesiastical authorities till 1857, when it was entirely transferred by the Court of Probate Act, 20 & 21 Vict. c. 77, to a specially constituted Probate Court; by sec. 4 of that Act "the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons . . . shall, except as hereinafter is mentioned, be exercised . . . in a Court to be called the Court of Probate." The exception alluded to refers to suits for legacies and distribution of residues; these had been entertained by the old Ecclesiastical Courts, but were expressly reserved by sec. 23 of the Act, and would now be dealt with in Chancery. Sec. 23 further provided that the new Court should have the same powers, and its grants and orders should have the same effect throughout all England as the grants and orders of the Prerogative Court of the Archbishop of Canterbury then had.

(i.) *The Probate, Divorce, and Admiralty Division*.—The Probate Court maintained its separate existence till 1875, when, by the coming into operation of the Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66, the Probate Court as such was abolished, and became part of the Supreme Court of Judicature (s. 3), which is divided into the Court of Appeal and the High Court of Justice. The High Court of Justice is declared to be a superior Court of record, and amongst other jurisdictions that of the Court of Probate is transferred to it (s. 16). The High Court of Justice was divided into five, now three, Divisions, the Probate, Divorce, and Admiralty forming one. All causes and matters pending in the Court of Probate, and all causes and matters which, if the Act had not been passed, would have been within the exclusive cognisance of the Court of the Probate, were assigned to the Probate Division (s. 34). The judges of the Probate, Divorce, and Admiralty Division were to be two in number (s. 31, subs. 5); but causes were to be heard before one judge only (s. 42).

(ii.) *Registrars*.—By the 14th section of the Act of 1857 there were

to be three registrars, various record keepers, and other minor officials, and a district registrar for each district registry in England and Wales. The powers of the district registrar are (1) to grant probate or letters of administration in common form, if it appears on affidavit that the deceased had a fixed place of abode within the district (s. 46); (2) where there is any dispute, the district registrar may not grant probate or administrations till after the contention is disposed of "by decree or otherwise," when the grant would go through in the ordinary form (s. 48). The ordinary jurisdiction of the principal registry extends to the City of London, the counties of Middlesex, Surrey, Hertfordshire, and parts of Kent and Essex, and includes cases arising in connection with deaths abroad. Application may, however, be made in all cases direct to the principal registry at the option of the applicant, and there is no obligation to proceed in the district registry or County Court (s. 59; see also 21 & 22 Vict. c. 95, s. 20). The principal registry thus has jurisdiction of three kinds:—(a) ordinary non-contentious jurisdiction for the above area; (b) concurrent non-contentious jurisdiction all over England; and jurisdiction for deaths abroad; (c) exclusive contentious jurisdiction after warning of the caveat (see below, and sec. 2 of the Act).

(iii.) *County Court*.—In contentious matters where the personal property of the deceased is under £200 (not deducting debts), or if realty is under £300 (not deducting mortgages, see *Davis v. Brecknell*, 1870, 2 P. & D. 177), the judge of the County Court having jurisdiction in the place where the deceased had at the time of his death a fixed abode has power to grant and revoke probate and administrations (Probate Act, 1858, s. 10; Probate Act, 1857, ss. 55, 56, and 57); even where the property is below the limit, however, application may be made direct to the High Court, the judge having power to remit if he pleases. When the County Court has heard the case and made a decree, the registrar of the County Court transmits the papers to the proper district registrar, and thereon probate or administration issues out of the district registry (Probate Act, 1857, s. 55). The probate rules (contentious business) are binding on the County Court judge (*Leigh v. Green*, [1892] P. 17).

(iv.) *Appeals*.—Appeals lie from the County Court to the Probate Division sitting as a divisional Court (R. S. C., Order 59, r. 4). From the Probate Division itself appeals lie in the ordinary way, and subject to the ordinary rules, to the Court of Appeal and the House of Lords (R. S. C., Order 58, and Appellate Jurisdiction Act, 1876).

(v.) *Rules*.—Besides the natural division into proof of wills and administration, probate work is either contentious, or else non-contentious or common form. Sec. 2 of the Act of 1857 defined the common form business to mean "the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administration through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also business of lodging caveats against the grant of probate or administration." Much of the ordinary work of the division comes under this head. All other business is contentious, *e.g.* where a will is disputed or a contest arises as to who is entitled to letters of administration.

By the Court of Probate Act in 1857, the practice of the new Court was, except where otherwise provided by the Act, or by rules or orders to be from time to time made under the Act, to be, so far as the circum-

stances of the case would permit, according to the practice in the Prerogative Court (s. 29), meaning thereby the Prerogative Court of Canterbury; and power was given to make rules (s. 30). By the Judicature Act, 1875, 38 & 39 Vict. c. 77, "all rules and orders of Court in force at the time of the commencement of this Act (*i.e.* November 1, 1875) in the Court of Probate, except in so far as they are expressly varied by the schedule hereto or by rules of Court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act" (s. 18). The Judicature Acts of 1873 (s. 23) and of 1875 (s. 21) both contain general provisions that, apart from any special provisions of the Acts themselves, or any special rules made thereunder, the transferred jurisdiction should be exercised by the High Court as nearly as may be in the same manner as the same might have been exercised in the old Courts, and, save as above, the older "forms and methods of procedure" are retained. The rules now in force for the Probate Division are—(a) Non-contentious business—(i.) Rules and Orders of 1862, 1865, 1871, made in pursuance of the Probate Act of 1857; (ii.) Rules and Orders of 1882, 1887, and 1892, made in pursuance of the Probate Act of 1857 and of the Judicature Act of 1875, together with various tables of fees published from time to time. The rules in existence for non-contentious business before the passing of the Judicature Act still govern the procedure of the Court, that Act not having affected the non-contentious practice (*Goods of Tomlinson*, 1881, 6 P. D. 209). (b) Contentious business—Rules and Orders of 1862, made in pursuance of the Probate Acts of 1857 and 1858. The Judicature Act has very seriously affected the contentious practice of the Court. The old probate suit has now become a probate action, and the rules of 1862 are only applicable in so far as they are not repugnant to the Judicature Acts, or to the Rules of the Supreme Court made thereunder.

3. JURISDICTION.

The English Court will not assume jurisdiction to grant either probate or administration in every case.

(a) *As to property*, the subject-matter of the Court's jurisdiction is—

(i.) Personalty situate in England or in transit to this country at the time of death (*Evans v. Burrell*, 1859, 4 Sw. & Tr. 186). "It is a condition precedent to a grant that it should appear that the deceased left property in this country, either real or personal" (Walker and Elgood, 4th ed., p. 35), and that irrespective of the question of domicile (Dicey, *Conflict of Laws*, 1896 ed., p. 316; *contra*, Powles and Oakley, 4th ed., p. 144). And under 27 & 28 Vict. c. 56, s. 4, a ship or share of a ship registered at a port in the United Kingdom is to be taken as part of such personalty, though the vessel may be at sea at the owner's death. So a will limited to the disposal of property in a foreign country will not be entitled to probate here (*Goods of Coode*, 1867, L. R. 1 P. & D. 449); and if the testator expressly restricted the application of his will to property abroad, then there will be an intestacy as to property here, and a grant of administration must issue (*Goods of Mann*, [1891] P. 293). The English will may refer to a foreign one, and the Court

will incorporate the latter in the English probate if necessary (*Goods of Harris*, 1870, L. R. 2 P. & D. 83); but so long as there is no connection between them, the Court will usually refuse to grant probate of the foreign will (*Goods of Murray*, [1896] P. 65, and cases there cited).

So letters of administration will not issue if the deceased left no personal property situate within the jurisdiction of the Court.

Conversely the grant of probate or administration in the English Court has no direct operation abroad. "It must not be understood that where a testator dies domiciled in England leaving assets abroad, the grant of probate here (or of letters of administration) can extend to them. . . . For the probate (or letters of administration) was never granted except for goods which at the time of death were within the jurisdiction of the ordinary, who made the grant" (Williams on *Executors*, 10th ed., p. 273; Dicey, *Conflict of Laws*, 1896 ed., p. 345).

An English administrator or executor may, however, sue in this country for foreign assets (*Whyte v. Rose*, 1842, 3 Q. B. 493; 61 R. R. 275), and the foreign Courts will usually recognise the status of the English representative on application.

Special provision has been made by the legislature for the recognition of an English grant in Scotland (21 & 22 Vict. c. 56, s. 14) and Ireland (20 & 21 Vict. c. 79, s. 94), and in the United Kingdom of grants made in the colonies (55 Vict. c. 6). For a case of colonial probate, see *Goods of Smith*, [1904] P. 114).

(ii.) *Real property*, also situate in England. Up till 1897 the Court had no jurisdiction to grant probate of a will which referred only to realty, though the fact that the will affected to dispose of some realty would not prevent the grant going if there was personalty devised as well. Where a mixed will of this nature is disputed, the heir and persons interested in the realty must be cited (Probate Act, 1857, s. 61).

Similarly, a grant of administration could not pass realty; chattels real, however, go to the personal representative under the old law, and mortgages and trust estates also, since 1881 (Conv. Act, 1881, s. 30).

Even if a will purported to pass no personalty, it was always sufficient to give the Court jurisdiction if the will appointed a personal representative, and that even though the executor renounced (*Goods of Jordan*, 1867, L. R. 1 P. & D. 555). Now by Part I. of the Land Transfer Act, 1897, real estate devolves on the personal representative as if it were a chattel real (s. 1 (1)); and "probate and letters of administration may be granted in respect of real estate only, although there is no personal estate" (s. 1 (3)). Real estate does not include land of copyhold or customary tenure; and the Act is not retrospective. Apparently the Act does not allow a separate real representative to be appointed, but clothes the old personal representative with full rights as to realty. Grants never extended to foreign realty under the old law, and the Act makes no alteration in this respect. The heir-at-law is to rank equally with next-of-kin in obtaining grants from the Probate Court (*Goods of Ardern*, [1898] P. 147). An executor appointed under a will of realty who does not take out probate must renounce, or there is an estate outstanding (*Pawley v. London and Provincial Bank*, [1900] 1 Ch. 58; *Cohen's Executors v. London County Council*, [1902] 1 Ch. 187); though the legal estate in copyhold will not pass to the legal personal representative, yet the equitable interest does so pass (*Re Somervell & Turner's Contract*, [1905] 2 Ch. 583).

(iii.) Certain property is specially exempt from the jurisdiction of the Court by statute, so that no grant of probate or administration thereof is necessary; *e.g.* navy money, or effects of seamen, not exceeding £100; soldiers' pension or pay, and money and effects of merchant seamen, in each case not exceeding £50; deposits in savings bank, or shares in an industrial society, not exceeding £50, together with money paid in compensation under Lord Campbell's Act (Tristram and Coote, *Probate Practice*, 14th ed., p. 10).

(b) *Person*.—Even if the deceased leaves property situate in England, but is not domiciled in this country, the English Court is not primarily the one from which a grant should be obtained; the Court of the domicile is *prima facie* the proper one to grant probate or administration (*Enohin v. Wyllie*, 1862, 10 H. L. 1); and if that Court has pronounced a decree on any question of succession or administration, the English Court will follow its decision (*Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301; *In re Trufort*, 1887, 36 Ch. D. 600; *Goods of Meatyard*, [1903] P. 125).

The foreign grant, however, will not of its own force vest in the representative appointed by the foreign Court, property situate in England; "for the Courts here will not recognise any will of personality except such as the Court of Probate in this country has by the probate adjudged to be the last will" (Williams on *Executors*, 10th ed., p. 270; *Price v. Dewhurst*, 1838, 4 Myl. & Cr. 76; 41 E. R. 30; 48 R. R. 11); and the foreign administrator must obtain an ancillary grant here in order to sue or lawfully obtain possession of assets.

At the same time the English Court will usually act ministerially and adopt the representative selected by the foreign Court (*In re Hill*, 1870, L. R. 2 P. & M. 90; *Goods of Meatyard*, [1903] P. 125); but the grant may be in a different form to the foreign one, *e.g.* administration with will annexed instead of grant to executor according to tenor (*In re Cosnahan*, 1866, L. R. 1 P. & M. 183). Where there are no proceedings, however, pending in the Court of the domicile, the grant will be general in character, and not limited to assets here (*Orr-Ewing's Case*, 1883, 9 App. Cas. 34). If the case comes into the English Court, that Court will apply the law of the domicile to decide the following questions:—(1) The validity or otherwise of the will; (2) the construction of the will; (3) the right of succession (*Hog v. Lashley*, 1792, 3 Hag. Ec. 415). The grants made by the Court are mainly of three kinds; grants of probate or proof of a will; grants of letters of administration with the will annexed; and simple grants of administration.

4. PROBATE.

The will must comply with the requirements of English law, or the Court cannot grant probate. The will must be (i.) in the *form* required by the Wills Act, 1 Vict. c. 26, signed that is at the end by the testator (15 Vict. c. 24, s. 1), in the presence of two witnesses, who must also sign in the testator's presence and in the presence of one another (Powles and Oakley, 4th ed., p. 49); it will be sufficient if the testator acknowledge his signature in the presence of the witnesses who thereupon sign, provided they see the testator's signature already affixed (*Daintree v. Fasulo*, 1888, 13 P. D. 67).

Soldiers on actual service, and seamen, whether merchant or otherwise, when actually at sea, can, however, make their wills without restriction as to form (*Goods of Scott*, [1903] P. 243): these privileged

wills may be in writing but without witnesses, or oral; and may be made by a minor (Tristram and Coote, 14th ed., p. 46); the soldier must be *in expeditione* (*May v. May*, [1902] P. 103).

Where the deceased makes his will abroad, the general rule of international law is that it must be in the form required by the law of the testator's domicile at the time of making (*Price v. Dewhurst*, 1838, 4 Myl. & Cr. 76; 41 E. R. 30; 48 R. R. 11). As to British subjects, however, 24 & 25 Vict. c. 114 provides that after 1861 the will shall be good in form if (1) when made abroad it is good according to the forms required either by *lex loci* or by *lex domicilii* of testator at the time, or by the *lex domicilii originis* of the testator if that be within Her Majesty's dominions (s. 1); (2) if, when made in the United Kingdom, it satisfies the *lex loci*, whatever the testator's domicile (s. 2). And (3) if the will has once been valid, changes of domicile shall not invalidate it (s. 3; see *Stokes v. Stokes*, 1898, 67 L. J. p. 55). Sec. 3 applies in the case of foreigners (*Re Groos*, [1904] P. 269), but the Naturalisation Act putting aliens on the same footing as British subjects for the purposes of holding and disposing of property (s. 2) does not extend to aliens the privilege of sec. 1 of 24 & 25 Vict. c. 114 (*Goods of Buseck*, 1881, 6 P. D. 211; *Bloxam v. Favre*, 1883, 8 P. D. 101).

(ii.) The testator must have had testamentary capacity; infants cannot make a will (Wills Act, s. 7); nor can lunatics, save during a lucid interval. The fact that the testator was subject to delusions will not invalidate the will if his mind was clear on the material points (*Boughton v. Knight*, 1873, L. R. 3 P. & D. 64; *Banks v. Goodfellow*, 1870, L. R. 5 Q. B. 549). See article LUNACY, Vol. VIII. p. 448. So habitual drunkards are incapable of making a will when in drink (see, generally, Williams on *Executors*, 10th ed., p. 14; Powles and Oakley, 4th ed., pp. 21-48. As to wills of married women, see Powles and Oakley, 4th ed., p. 42). The will is revocable till death, and therefore conjoint wills are illegal (*Stone v. Hoskins*, [1905] P. 194).

(iii.) The testator must have known and approved of the contents of the will; if words have been introduced by inadvertence and without the testator's consent, the Court will not grant probate of them (*Morell v. Morell*, 1882, 7 P. D. 68). Absence of personal instructions may affect costs (*Aylwin v. Aylwin*, [1902] P. 203). If two documents are both executed as a will, and there is no evidence as to their relative date, the Probate Court will admit both to probate and leave the Chancery Court to decide the question of construction (*Townsend v. Moore*, [1905] P. 66); a later document revokes an earlier if inconsistent with it (*Goods of Bryan*, [1907] P. 125).

(iv.) Finally, the testator must have been acting as a free agent, and not under stress of fraud or undue influence. "The influence to vitiate an act must amount to force and coercion. It must not be the influence of affection and attachment" (Williams on *Executors*, 10th ed., p. 32; *Parfitt v. Lawless*, 1872, L. R. 2 P. & D. 462; *Wingrove v. Wingrove*, 1886, 11 P. D. 81). See on whole subject, UNDUE INFLUENCE; INCORPORATION OF DOCUMENTS.

Wills may be revoked—by (a) a subsequent valid marriage (see sec. 18 of the Wills Act, and *Warter v. Warter*, 15 P. D. 152); (b) by another will or codicil or a revoking document executed as a will; (c) by burning, tearing, etc., of some material portion of the will with intention to destroy it. Where an earlier will is destroyed under the belief that a later one has been made, or is about to be made, and this

belief is untrue, the earlier will revives (*Dixon v. Solicitor to the Treasury*, [1905] P. 42).

Grants of probate are of two kinds, in common form and in solemn form.

(i.) In *common form*. This will be made (a) to the executor directly appointed by the will; (b) if none is directly named executor, but executor's functions, e.g. payment of debts, are given to any person, he will be executor according to the tenor (*Goods of Punchard*, 1872, L. R. 2 P. & D. p. 369, and cases there cited). A man may also be executor *de son tort* by intermeddling, though not appointed by the will or by the Court (Williams on *Executors*, 10th ed., p. 183).

An executor cannot be compelled to take unless he has intermeddled: if dilatory, he may be cited to take or refuse probate (C. P. Act, 1857, ss. 23, 25); and if he refuse to take or appear, then the rights of representation to the testator shall go as if he had not been appointed (C. P. Act, 1858, s. 16); where several executors are appointed, one may get a grant without notice to the other, and power is then reserved to the others to apply for a grant at any time. The executor's title is usually indefeasible, and he cannot be passed over by reason of bankruptcy, insolvency, felony, such even as an admitted tampering with the will (*Goods of Mary Hett*, 1843, 6 Jur. 350), or general bad character (*Goods of Samson*, 1873, L. R. 3 P. & D. 48). He may, however, be excluded from probate on the grounds of lunacy (*Evans v. Tyler*, 1849, 2 Rob. Eccl. 131). The title of the executor depends on the will, and he must get it confirmed or proved; to this end he must make two separate oaths or affirmations—(a) the oath of office, that he will duly administer the estate; (b) the oath for inland revenue.

The oath of office mentions the date on which the testator died, and if this cannot be stated accurately, the registrars must be satisfied as to the reason; they may also require proof as to identity of the executor. The oath refers to the will, which is annexed, and which must be marked by the executor (N. C. B. Rules, 1862, rr. 47, 48, 49). Application cannot be made till seven days have elapsed from testator's death, save by leave of Court. Applications after three years from the death will require explanation (rr. 43, 45). The oath as to property is for the use of the Commissioner of Inland Revenue, 43 Vict. c. 14, s. 10; 44 Vict. c. 12, s. 26; and see DEATH DUTIES. In the case of testator's death since 1894, the executor is required to state in accounts annexed to the affidavit all the property in respect of which estate duty, as defined by the Act, is payable (s. 8 (3)).

The grant when obtained will confer the right to administer all the testator's estate situate in England, personal and real; the latter includes all real estate vested in any person, without a right in any other person to take by survivorship save land of copyhold tenure, or customary freehold, where any act by the lord is necessary to perfect the title of a purchaser (60 & 61 Vict. c. 65, s. 1); but no power to administer estate situate elsewhere. If the testator, however, left property in Ireland or Scotland as well as in England, the probate can be made to apply to all property within the United Kingdom (21 & 22 Vict. c. 56, ss. 14, 15, 17). In such cases the value of the property in Scotland or Ireland must be separately stated in the affidavit; and the registrar must sign a memorandum that deceased died domiciled in England; this is called notation of domicile (N. C. B. r. 74). If a will

or codicil exists in duplicate, and one part is brought in for probate, the duplicate must also be produced, or its absence explained to the satisfaction of the registrar on affidavit.

The will may consist of more than one document (see INCORPORATION OF DOCUMENTS); and objections may be made in the registry to the grant on the ground of alterations or erasure. For case of incorporation of a library catalogue, see *Goods of Balme*, [1897] P. 261.

If the attestation is imperfect, the registrars must require an affidavit from at least one of the attesting witnesses (N. C. B. r. 4); if from the affidavit of both attesting witnesses it shall appear that the requirements of the Wills Act have not been complied with, the registrars shall refuse probate (r. 5). Probate of a copy of a lost will is granted on proof that there was an original duly executed in existence since the testator's death, and that the copy is a true one. Probate in common form of a draft will only be granted where the next-of-kin consent.

(ii.) *Probate in Solemn Form*, that is, by decree after action brought in open Court, and will usually occur in two cases—(1) Where the executor is himself doubtful of the validity of the will. A writ of summons must be served on the next-of-kin, and also on the heir-at-law and other persons interested in the realty (C. P. Act, 1857, s. 61); where there is no realty, the heir-at-law need not be cited (s. 63; see also C. B. r. 78; C. B. r. 6; *Moore v. Holgate*, 1866, L. R. 1 P. & D. 101).

Probate when granted in common form is revocable. Any person whose interest is adversely affected may call it in, and put the party who obtained it to proof in solemn form (*Merryweather v. Turner*, 1844, 3 Curt. 802, 817). Payments made before the grant is revoked are valid (C. P. Act, 1857, s. 77). But the advantage of probate in solemn form is that it is irrevocable, provided all persons interested are before the Court (*Wytycherley v. Andrewes*, 1871, 2 P. & D. p. 327), unless a will of later date is subsequently discovered (*Priestman v. Thomas*, 1884, 9 P. D. 70). Executors should always prove in solemn form if there is any doubt. Material evidence may be lost if solemn proof is required later on; while the executor may have then to account for legacies, if probate is revoked, and he can only have recourse to legatees. If deceased was a bastard, the King's Proctor must be made a defendant. The executor propounds the will in a statement of claim, and at the hearing must call at least one attesting witness to prove due execution (*Belbin v. Skeats*, 1858, 1 Sw. & Tr. 148); and if the Court is not satisfied he must call the other witness also, even though he be hostile (*Coles v. Coles*, 1866, L. R. 1 P. & D. 70).

(2) Where the will is really disputed by the next-of-kin or others. Proceedings in such a case are usually preceded by a caveat, though caveats technically come within the non-contentious business of the Court (N. C. B. Rules, heading). The practice as to caveats follows the old rules (C. P. Act, 1857, s. 53), and is to be found in N. C. B. rr. 59-67, C. B. rr. 7-12, and district registries 72-78. The object of entering a caveat is to secure that no grant shall issue without notice to the caveator. It may be entered either in the principal or in a district registry, and remains in force six months, but may be renewed. Its effect is to stay all proceedings for a grant till it expires, or is subducted, *i.e.* withdrawn by the party who entered it, or is warned. The warning is a notice given by the registrar of the principal registry (where all warnings must be entered) to the caveator or his solicitor, "warning" him within six days after service to enter an appearance in the principal

registry, and to set forth his interest. The warning may be personal or by post. If there is no appearance to the warning in seven days, the grant issues, in spite of the caveat, service of the warning, search, and non-appearance being proved by affidavit. The warning must state the interest of the person issuing it, and give an address for service within three miles of the General Post Office (C. B. rr. 11, 21; N. C. B. r. 65).

If appearance is entered, the person warning can either take out a summons to show cause why contentious proceedings should be discontinued, and grant not issued, or he may commence a probate action by issuing a writ. Contentious proceedings are now mainly governed by the Judicature Act, 1875, and the ordinary R. S. C. (but see also Judicature Act, 1875, s. 18), and are always commenced by writ of summons, and not, as formerly, by citation (Order 2, r. 1; see generally, Tristram and Coote, 14th ed. 301). Parties to the suit may be either those interested under the document, such as executors or legatees, or those interested in the estate, either by reason of relationship, such as next-of-kin, or from other cause, *e.g.* a creditor. Parties to probate actions are the same now as before the Judicature Act (Judicature Act, 1875, s. 11, subs. 3). Every person having an interest must be brought before the Court, either by being made a party or by being cited to see proceedings. Generally as to parties, see R. S. C., Order 16. Where several persons have the same interest, one or more may be authorised to represent the others (r. 9). Next-of-kin are entitled to put executors to prove the will in solemn form (C. B. r. 5); and any person whose interest is affected, is entitled to intervene by obtaining leave on summons (C. B. r. 6). A creditor generally may not oppose the will (see Williams on *Executors*, 10th ed., p. 246), unless he has been appointed administrator; and he need not be cited. Infant defendants (under seven years) must have a guardian *ad litem*, assigned by the judge if they have no testamentary or other lawful guardian (N. C. B. Rules, 1862, r. 34); but minors (from seven to twenty-one years) may choose their own guardian, though the Court is not always bound by the choice (*Goods of Jenkins*, 1869, L. R. 1 P. & D. 690). Infants sue by their next friends (Order 16, r. 16).

Proceedings in a probate action follow generally the ordinary practice of the Queen's Bench Division under the Judicature Acts (see PLEADINGS; COSTS; DISCOVERY; EVIDENCE; APPEALS; Tristram and Coote, 14th ed. pp. 301 *et seq.*; for administration, *pendente lite*, see below, p. 478).

There are two other forms of actions common in the Probate Division—(i.) Interest suits. Where the legal interest of a person in the estate of the deceased is denied; this may either be a collateral question in a testamentary suit or an original action where the right to grant of administration is disputed (C. B. rr. 61, 62). Questions of legitimacy or pedigree may be involved, or of relative fitness, *e.g.* of male or female with equal interests (*Cordeux v. Trasler*, 1865, 4 Sw. & Tr. 48; *Goods of Farrand*, 1876, 1 P. D. 439), or of a majority of interests (*Goods of Hornan*, 1883, 9 P. D. 61).

(ii.) Actions for revocation of probate (when granted in common form) or of letters of administration: the grants are called in by citation, and an action for proof in solemn form or an interest suit follows.

An important provision is made by the rules for next-of-kin and others who wish to have the circumstances under which the will was executed inquired into. In all cases the party opposing the will may,

with his pleading, give notice to the plaintiff that he only intends to cross-examine the witnesses produced in support of the will (C. B. 1862, r. 41; R. S. C., Order 21, r. 18). The party giving notice will then be released from the liability to pay any costs but his own, unless he alleges fraud or the proceedings are vexatious (*Beale v. Beale*, 1874, L. R. 3 P. & D. 179; *Leigh v. Green*, [1892] P. 17). Whether the party giving notice will get costs out of the estate depends on the ordinary rules (see COSTS); and see also *Spicers v. English*, [1907] P. 122. The rule was modified in 1898 so as to make it quite clear that even the notice will be no protection unless there was "reasonable ground for opposing the will" (*Spicer v. Spicer*, [1899] P. 38). In any case the notice is only available to a defendant opposing a will, not to a plaintiff asking revocation of a common-form grant (*Tomalin v. Smart*, [1904] P. 141). In all cases of defence to a probate action the "substance of the case" must be stated; R. S. C., Order 19, r. 25*a*; and where unsoundness of mind is pleaded particulars of the specific instances of delusions relied on must be delivered before the trial (*Howell v. Shanahan*, *Times*, Jan. 26, 1907).

5. ADMINISTRATION WITH THE WILL ANNEXED.

This is granted where there is a will but there is no executor, because—(i.) there is no executor appointed by the will; (ii.) or the executor appointed renounces, or does not appear when cited; (iii.) the executor has died in the testator's lifetime, or after his death, without proving; if he has proved, the office will pass to his executor by the chain of executorship (EXECUTORS AND ADMINISTRATORS); if he has proved, and partially administered, but dies intestate, a grant *de bonis non administratis* with the will annexed is made; (iv.) where the Court uses its discretion under sec. 73, C. P. Act, 1857. An administrator with will annexed must give security like a simple administrator (*vide infra*); otherwise his duties and position are those of an executor (N. C. B. rr. 37, 47, 49).

In selecting the administrator, the Court will primarily prefer the person taking the largest interest under the will. This will be—(a) The residuary legatee, who "is the testator's choice; he is the next person in his election to the executors" (*Atkinson v. Barnard*, 1815, 2 Phillim. 317; *Re Pryce*, [1904] P. 301); his interest being uncertain till the debts and legacies are paid, he has the largest interest in a careful administration. This rule applies equally to a residuary legatee in trust (*Goods of M'Auliffe*, [1895] P. 290). The grant will apply to realty since 1898. Where the residuary legatee survives the testator, and has a beneficial interest, his representative has the same right to administration with the will annexed as the residuary legatee himself, and is preferred to the next-of-kin; *secus*, if he be merely residuary legatee in trust (Williams on *Executors*, 10th ed., p. 372; *Goods of Ditchfield*, 1870, L. R. 2 P. & D. 152). (b) In default of residuary clause or if the legatee decline, the grant will go to widow or next-of-kin under 21 Hen. VIII. c. 5, s. 3; but not to their representatives. (c) Finally, the grant may issue to creditors or legatees (Williams, *loc. cit.*; *West v. Wilby*, 1820, 3 Phillim. 381).

Sec. 73 of C. P. Act, 1857, makes provision under the following special circumstances:—

(a) When person has died wholly intestate as to personalty;

(b) Or leaves a will of personalty but no executor;
 (c) Or the executor at testator's death is resident out of the United Kingdom;

(d) And it shall appear to the Court "necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special reasons," the Court may use its discretion to appoint anyone it may think fit, other than the person by law entitled. So grants have been made to nominee of a creditor (*Goods of Brown*, 1888, 59 L. T. 523); to a legatee on bankruptcy of executor (*Goods of Cooper*, 1869, L. R. 2 P. & D. 21; and see Powles and Oakley, 4th ed., p. 139). Generally speaking, all the rules in the Probate Division have been modified so as to admit of realty being administered conjointly with personalty under Land Transfer Act, 1897; but the Court has no jurisdiction to extend the statutory powers under this section to realty (*Goods of Roberts*, [1898] P. 149).

6. SIMPLE ADMINISTRATION.

(i.) *General Grants*.—This is made where the deceased has died wholly intestate; disqualifications for executor apply equally to an administrator, and extend also to outlawry and bankruptcy, but not alienage. Minors are incompetent, as they cannot execute a bond. Coverture is no disqualification; but before 1882 the husband had to join in the bond; now he need not. The order of selection is prescribed by statute. 31 Edw. III. st. 1, c. 11, ordered the ordinary to "depute of the *next and most lawful friends* of the dead person intestate to administer his goods." 21 Hen. VIII. c. 5, substituted "widow or next-of-kin, or both." The right of the husband to rank first on the same level with the wife was recognised by 29 Car. II. c. 3, s. 25; the husband, however, will be passed over without even being cited, if guilty of cruelty or judicially separated. If the husband die without administering, the right passes to his personal representative (Williams on *Executors*, 10th ed., p. 323; *Goods of Harding*, 1872, L. R. 2 P. & D. 394). The widow will be passed over, like the widower, for adequate cause, such as adultery (*Goods of Anderson*, 1864, 3 Sw. & Tr. 489); unlike the widower, if she die before administration, the right will not pass to her representatives. If passed over, the widow will usually be cited, in accordance with the general rule that parties having prior right to a grant must generally be cited (Williams, *loc. cit.*, p. 358). After widow and widower come the next-of-kin in the following order:—Children, grandchildren, and descendants in direct line, then father, mother, brothers and sisters, grandfathers and grandmothers, nephews and nieces. Where there is a contest between several next-of-kin equally entitled, the Court follows certain rules—(a) The grant will be made as desired by the majority of interests; (b) other things being equal, males will be preferred to females; (c) grant is sometimes made *priori petenti* (*Cordeux v. Trasler*, 1865, 34 L. J. P. & M. p. 128). A grant will not be made to more than three persons, and a sole is preferred to a joint grant (*Warwick v. Greville*, 1869, 1 Phillim. 123). Under the Land Transfer Act, 1897, s. 2 (4), the heir-at-law is to rank equally with the next-of-kin as entitled to grant of letters (*Goods of Barnett*, [1898] P. 145). The personal representative appointed by a foreign Court will usually be recognised here, though he must take out a grant (*Goods of Beg*, 1898, 67 L. J. 59).

To bastards without issue the Crown takes administration, but now

retains only a percentage, allowing the residue to go to the natural relatives (Royal Warrant, July 25, 1771). Administration is granted to the Treasury Solicitor, who is constituted a corporation sole (39 & 40 Vict. c. 18, s. 1). Questions of legitimacy, save for succession to realty, are decided by the law of the domicile (*Goodman's Trusts*, 1881, 17 Ch. D. 266); to succeed to English realty legitimacy by English law is necessary (*Doe v. Vardill*, 1835, 2 Cl. & Fin. 571; 6 E. R. 1270; 37 R. R. 253). *Semble*, a next-of-kin, according to law of the domicile, but illegitimate according to English law, could take a grant as to realty in England under Act of 1897, though he could not succeed to realty. The Court has finally, under sec. 73 (*vide supra*), wide powers of making grants to outsiders, provided there is no one entitled to administration. The section is most frequently utilised for making grants to creditors (*Goods of Wensley*, 1882, 7 P. D. 13; and for other cases, see Powles and Oakley, 4th ed., p. 139).

Where there has been a limited grant originally, *e.g.* until a specified time or event is accomplished, a new grant must be made when the first is accomplished. This will be an absolute and permanent grant, following on a temporary one, and on that ground to be distinguished from a grant *de bonis non*, where a limited grant follows an absolute one. Such supplemental grants are called *cessate*, *e.g.* administration granted to a guardian of a widow during her minority; when she attains full age she takes out a full grant, and usually must give the same security as the first administrator (*Abbott v. Abbott*, 1818, 2 Phillim. 578).

(ii.) *Limited Grants*.—(1) *De bonis non*.—Where executors or administrators have obtained grants, but have not fully administered the estate, it may be necessary for the Court to appoint some one to complete the work: called a grant *de bonis non administratis*, or *de bonis non*. (i.) As to executors this will not usually be necessary, for if the executor has himself left a will and appointed an executor, then by the chain of executorship the first executor's right of administration will pass to the second, and so on. If there are several executors, and none renounce, the estate only becomes transmissible on the death of the survivor; but the rights of an executor who renounces cease entirely (C. P. Act, 1857, s. 79). Consequently it is only when the chain of executors fails that a grant *de bonis non* can be given when the deceased left a will. The grant will be *de bonis non* with the will annexed for persons entitled (see above). Where an estate was administered all but one legacy, the Court granted administration with will annexed to the legatee (*Goods of King*, 1883, 8 P. D. 162). (ii.) Administrators. Here there is no chain of succession, each administrator deriving title only from the Court; therefore, whenever an administrator, simple or with will annexed, leaves a portion of the estate unadministered, an administrator *de bonis non* will be necessary. The grant will go, according to the ordinary rule, to the person with the largest interest. Where the first administration was a simple one, the Court will consider who were the next-of-kin at the moment of the intestate's decease, not at the moment of the grant *de bonis non* (see *Goods of Carr*, L. R. 1 P. & D. and rules there laid down).

(2) *Durante minore etate*.—This kind of administration has frequently been held not to be within 21 Hen. VIII. c. 5, and it was, therefore, discretionary with the Court to grant it to whomsoever it pleased (Williams, 10th ed., p. 387).

The guardian is the person usually selected (for distinction between guardians to minors and to infants, see above). A testamentary guardian will be preferred to one chosen by the minors themselves (*Goods of Morris*, 1862, 2 Sw. & Tr. 360). The Court need not appoint the next-of-kin, *e.g.* where the husband has deserted his wife; on her death intestate, leaving minor children, the grant goes not to the husband, but to the guardian selected by the children (*Goods of Hay*, 1865, L. R. 1 P. & D. 51; *Goods of Stephenson*, 1866, L. R. 1 P. & D. 287). On the death of the father the mother is the legal guardian, and requires no election (49 & 50 Vict. c. 27, ss. 1, 2). Where the intestate died insolvent, leaving children but no known relatives, a creditor was appointed guardian (*Goods of Peck*, 1858, 1 Sw. & Tr. 141). Since 1897 the grant may go to the guardian of a minor heir-at-law (*Goods of Ardern*, [1898] P. 147).

(3) *Durante absentia*.—If the executor or next-of-kin were out of the kingdom, the ecclesiastical Courts would always make a limited grant of administration during their absence. It is now possible to make such a grant in all cases of absence, even though the executor or administrator shall have got a grant first and gone abroad afterwards (C. P. Act, 1858, s. 18, extending previous Acts), provided they are abroad at or after the expiration of twelve months from the death of the testator or intestate; right is given to the next-of-kin, legatee, or any creditor to apply; this includes the personal representative of the legatee (*Goods of Collier*, 1862, 2 Sw. & Tr. 444). If the grant is made under a statutory power, the grant does not determine on return of the original grantee; *secus*, if the executor or administrator were absent to commence with; grants may be made during absence to attorneys of those entitled (*Webb v. Kirby*, 1856, 3 Sm. & G. 333; 65 E. R. 682). The power of such administrator determines on the death of his principal.

(4) *During Lunacy of Executor or Administrator*.—Where a sole personal representative becomes a lunatic the grant is usually made to his committee (Williams, *op. cit.*, p. 410), who will be preferred to the next-of-kin (*Alford v. Alford*, 1857, 3 Jur. N. S. 990).

If the lunatic has not been found so on inquisition the Court will exercise discretion, granting to a residuary legatee, or if none, to next-of-kin, or to a stranger. Where one of three administrators became insane, the letters of administration were brought into the registry and issued to the other two alone (*Goods of Phillips*, 1824, 2 Add. 335). For case of a pauper lunatic and grant to nominee of guardians, see *Goods of Eccles*, 1889, 15 P. D. 1.

(5) *Pendente lite*.—The Court may appoint administrators pending suit in any case where a dispute is involved, provided there is necessity for the appointment. The administrator would only have power over personalty, and if realty were involved, the Court has power to appoint a receiver thereof (C. P. Act, 1857, ss. 70, 71). The receiver of realty must be distinguished from a receiver in Chancery. *Semble*, since 60 & 61 Vict. c. 65, his appointment will no longer be necessary. The receiver of real estate had to give a bond in the ordinary way; and receivers and administrators appointed in this way must exhibit an inventory and render an account (Prob. Rules, C. B. rr. 79, 96). The nominee of the parties will usually be accepted (*De Chatelain v. De Pontigny*, 1858, 1 Sw. & Tr. 34); otherwise the Court will use its discretion.

The administrator's duties commence on day of appointment, and

cease when the action or appeal is disposed of; his powers are those of an ordinary administrator, save that he cannot distribute the residue.

(6) *Miscellaneous Grants*.—If a man has appointed some one to act as an executor at the end of a period, an administrator will be necessary till the period lapses; grants may also be made to substantiate proceedings in other Courts, either here or abroad (*Macleane v. Davison*, 1859, 1 Sw. & Tr. 425; *Goods of Oldenburg*, 1884, 9 P. D. 234).

If property be left both here and abroad, and a will is in existence applying only to property abroad, a grant will be necessary as to pass the property here (*Goods of Main*, [1891] P. 293). Where there are no next-of-kin, creditors, or other person applying, the Court has discretionary power to grant administration *ad colligenda bona defuncti*; it will be granted where there is danger to the estate owing to its perishable character; it can be made where the next-of-kin refuses a grant of letters (*Goods of Radnall*, 1824, 2 Add. 232); or to a creditor, so as to realise the goodwill of a business for which a good offer requiring instant possession had been made (*Goods of Schwerdtfeger*, 1876, L. R. 1 P. D. 424); it may also be granted to the Solicitor of the Treasury.

In cases of limited administration the persons entitled to the general grant may take out a grant *cæterorum*, enabling them to deal with the rest of the estate. A grant, save and accept, is the reverse of this, and is a general grant, save and except the limited one.

(iii.) *Practice*.—The practice as to simple administration is dealt with in Probate Rules, 1862, N. C. B., and much of what has been said above as to probate applies equally to administration. Application may be made at the principal registry in *all* cases (r. 1); no letters of administration are to issue till fourteen days after death, save by leave of judge or two registrars (r. 44); delay in application beyond three years must be explained; proof may also be required of identity (r. 48). The next-of-kin are the nearest blood relations living at the death of deceased intestate; if only one of such nearest blood relations applies, the registrars may require proof that the others have been cited (r. 28). Any person entitled to a general grant will not be given a limited one, save by leave of the judge on motion (r. 30); and no limited grant will be issued till all those entitled to general ones have consented, renounced, or refused to appear when cited (r. 29). Administrators, with and without a will, resident abroad, may take a grant themselves, or may get it through an attorney, properly appointed (r. 32). Grants are made to the guardian of a minor duly elected by the minor (r. 33); an infant under seven must have a guardian assigned by the judge or registrar (r. 34). The administrator must take the oath of office, and make the affidavit for Inland Revenue like the executor (r. 47). The oath of administrators must be so worded as to clear off all persons having a prior right to the grant, which must show on the face how the prior interests have been cleared off; the oath must set forth that the applicant is the only next-of-kin, or one of the next-of-kin, as the case may be (r. 37). It is most important that the applicant should be rightly described in the affidavit (*Powles, op. cit.*, p. 284). In addition to these affidavits, a bond, with sureties in double the amount under which the estate is sworn, is always required for administration (C. P. Act, 1857, ss. 81, 82), save in the case of the Solicitor to the Treasury applying on behalf of the Crown. The Court has no power of dispens-

ing with the bond (*Goods of Powis*, 1864, 34 L. J. P. & M. 55). But the Court will dispense with sureties in special cases (*Re Cory*, [1903] P. 62; *Tristram*, *op. cit.*, p. 85). The registrars are to take care that the sureties are responsible persons (r. 41); clerks to solicitors are usually objected to, but guarantee societies will be accepted; so also the husband of the administratrix. If a married woman is tendered as surety, it must be proved on affidavit that she has sufficient separate property. Foreign sureties are accepted, though not if the administrator reside abroad (*O'Byrne*, 1828, 1 Hag. 316). Two sureties are usually required (r. 39); the bond is in a penalty of double the amount to be administered, unless the Court shall direct otherwise (C. P. Act, 1857, s. 82). Sureties in certain cases must justify by the rules (r. 42); the Court will also generally require justifying security to be given by administrator, if next-of-kin apply for it, or a legatee, at any rate to the extent of their interests (*Jackson v. Jackson*, 1865, 1 P. & D. 14; *Pickering v. Pickering*, 1828, 1 Hag. 480). Creditors cannot usually require the administrator to justify, unless they can make out a very strong case (*John v. Bradbury*, 1866, 1 P. & D. 248).

[*Authorities*.—Williams on *Executors*, 10th ed.; Tristram and Coote, *Probate Practice*, 14th ed.; Powles and Oakley, *Probate*, 4th ed.]

Probation of Offenders.—Courts of Assize and Quarter Sessions have long exercised in the case of convictions on indictment a power to bind the offender over to come up for judgment when called upon, or, in the case of misdemeanor, to add to or substitute for any other lawful punishment, recognisances to keep the peace and be of good behaviour for a specified time. The latter power was not applied in the case of convictions for felony except under statutory authority, given as to the non-capital felonies included in the Criminal Law Consolidation Acts of 1861 (see RECOGNISANCE; ARTICLES OF THE PEACE).

By sec. 16 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, a Court of summary jurisdiction was given certain powers of discharge without punishment, or on recognisance, in trifling cases. By the Probation of First Offenders Act, 1887 (*v. FIRST OFFENDERS*, *ante*, Vol. VI. p. 86), an attempt was made to provide for release on probation of persons convicted for the first time of certain offences. The provisions of this Act added little to the powers already possessed by Courts of criminal jurisdiction.

Sec. 16 of the Act of 1879 and the Act of 1887 were repealed by the Probation of Offenders Act, 1907, 7 Edw. VII. c. 17, which came into force on January 1, 1908. This Act is one "to permit the release on probation of offenders in certain cases," and is not limited to first offenders. It deals both with cases tried summarily and with convictions on indictment for offences punishable with imprisonment.

Even where the summary charge is proved (s. 1 (1)) or conviction takes place on indictment (s. 1 (2)), the Court may come to the opinion "that having regard to the character, antecedents, age, or mental condition of the defendant, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to impose any punishment or more than a nominal punishment, or that it is expedient to release the offender on probation."

The Court, if it comes to this opinion, may, without proceeding to a conviction, make an order:—

(i.) Discharging the offender conditionally on his entering into a

recognisance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period not exceeding three years, as may be specified in the order, or in the case of a Court of summary jurisdiction, dismissing the information or charge.

Courts of summary jurisdiction may, it would seem, use the Act in any case in which they can proceed to summary conviction, including indictable cases under the Summary Jurisdiction Acts, 1879 and 1899.

Besides making such orders as above, the Court may order the offender—

(a) To pay such damages for injury or compensation for loss as the Court thinks reasonable, and if the offender is under 16, and the parent or guardian has, in the opinion of the Court, conduced to the commission of the offence, order him the damages or costs. The amount of compensation or damages to be ordered by a Court of summary jurisdiction is £10, unless a higher limit is fixed by the statute applying to the case (s. 1 (3)).

Orders under the above provisions have the effect of a conviction for the purpose of revesting or restoring stolen property, and of making orders for restitution on delivery of property to the owner (s. 1 (4)).

The Court may include in the recognisance:—

(a) A condition that the offender shall be under the supervision of a probation officer.

(b) Other conditions as to supervision specified in the order.

(c) A prohibition from associating with thieves or undesirable persons, or frequenting undesirable places.

(d) Conditions as to abstaining from intoxicating liquor where the offence was drunkenness or an offence committed under the influence of drink.

(e) Conditions for securing that the offender shall lead an honest and industrious life (s. 2).

The Court may on the application of a probation officer, and on notice to the offender, vary the conditions of the recognisance, and may on being satisfied that the offender's conduct has made longer supervision needless, may discharge the recognisance (s. 5).

By secs. 3 and 4, and rules made under sec. 7 (St. R. & O., 1907, No. 945), provision is made for the appointment of probation officers for every petty sessional division (including boroughs having a separate commission of the peace), and for their remuneration and duties, including the duties of visiting, advising, assisting, and reporting on the offenders put under their supervision. The remuneration in such boroughs is fixed by the town council; in counties by the standing joint committee of Quarter Sessions and the county council. It is contemplated that women may be appointed as probation officers for boys and girls of school age as well as for women and girls over 16. The probation officers for a petty sessional division will also be available for the supervision of persons put under recognisance by Courts of Assize or Quarter Sessions (s. 3 (3)).

Sec. 6 provides for the case of offenders who fail to observe the conditions of a recognisance:—

(a) The Court before which the offender is bound by a recognisance to appear for conviction or sentence; or any Court of summary jurisdiction, if satisfied by information on oath of failure to comply with any condition of the recognisance, may issue a warrant for the arrest of the offender or summon him and his sureties to attend the Court.

(b) The offender when apprehended if not brought forthwith before the Court before which he is bound by the recognisance to appear for conviction or sentence, is to be brought before a Court of summary jurisdiction.

(c) The Court before which an offender is brought on arrest or appears on summons, if not the Court before which he is bound to appear for conviction or sentence, is to remand him in custody or on bail until he can be brought before the latter Court. When he is remanded in custody, if under 16, he is dealt with so far as practicable under sec. 4 (1) of the Youthful Offenders Act, 1901, 1 Edw. VII. c. 20; if 16 or over, he is sent to any prison to which the Court having power to convict or sentence him can commit prisoners.

(d) On proof of failure to comply with any condition of the recognisance, the Court having power to convict or sentence the offender for his original offence may forthwith without further proof of guilt, convict or sentence him for the original offence; or if the offender is still under 12, send him to a certified industrial school, if it could in the first instance have made such order under 29 & 30 Vict. c. 118, s. 15.

The Act as already stated is not limited to cases of a first offence and seeks (on the model of American and colonial legislation) to deal with offenders by means of supervision and assistance rather than by imprisonment, especially in the case of youthful offenders and adults of respectable antecedents. The scheme of the Act is to suspend the punishment earned over the head of the offender for not more than three years, if he in the meanwhile complies with the terms on which the liability to conviction or sentence is suspended.

The Act has been long enough in force for the criminal classes to be anxious to profit by it, but not long enough to judge whether its effect is beneficial.

Procedendo.—Where the record of proceedings, either civil or criminal, has been removed into a superior Court by *certiorari* (*q.v.*), and it becomes necessary or expedient to restore the record to the inferior Court, a writ of *procedendo* issues on an order of a judge of the superior Court. The writ commands the judge of the inferior Court to proceed with the case, notwithstanding the writ of *certiorari* to him before directed. The order for a *procedendo* may be made by the judge in chambers (*R. v. Scalfie*, 1852, 18 Q. B. 773). In civil matters a *procedendo* issues where a defendant who has removed proceedings by *certiorari* into the High Court does not thereupon proceed with the action promptly in accordance with the rules of procedure of the Supreme Court (see Chitty's *Archbold*, 14th ed., 1560; Chitty's *Forms*, p. 804; Tidd's *Prac.*, 9th ed., p. 407).

Procedure.—See PRACTICE AND PROCEDURE.

Proceeding.—"Any proceeding" (sec. 89 of the Judicature Act, 1873) was held to be equivalent to "any action," and did not mean "any step in an action so" as to empower the judge of an inferior Court, on a motion for new trial, to give judgment for either party, as the High Court is empowered to do by Order 40, r. 10 (*Pryor v. City Offices Co.*, 1883, 10 Q. B. D. 504). But in rule 13, Order 64, R. S. C., "proceeding" is obviously used as meaning a step in an action; i.e. a step "towards" and not "after" judgment (*Houlston v. Woodward*, 1885, 78 L. T. J. 113).

"Any other proceedings in the action" (Order 26, r. 1, R. S. C.) means "any proceeding with a view to continuing the action" (*Spincer v. Watts*, 1889, 58 L. J. Q. B. 383). See MONTH'S NOTICE TO PROCEED.

The power given by sec. 85 of the Companies Act, 1862, to restrain "any action, suit, or *other proceeding*" against a company in liquidation, extends to quasi-criminal proceedings, *e.g.* for recovering penalties under the provisions of that Act (*In re Briton Medical, etc., Assurance*, 1886, 55 L. J. Ch. 416).

An examination of a witness, under sec. 115 of the Companies Act, 1862, is not a "proceeding" in a matter (*In re Grey's Brewery*, 1883, 53 L. J. Ch. 262); nor is a meeting of creditors for confirming or rejecting a scheme of arrangement of a debtor's affairs "a proceeding in Court" within subs. 1, sec. 105, Bank. Act, 1883 (*In re Strand*, 1884, 53 L. J. Q. B. 563).

A power of attorney "to commence and carry on, or to defend, etc., all actions, suits, or other proceedings," was held in *Ex parte Wallace*, 1884, 54 L. J. Q. B. 293, to confer an authority to sign a bankruptcy petition. See also *In re Winterbottom*, 1886, 56 L. J. Q. B. 238.

Proceedings in lieu of Demurrer.—Formerly the mode of disputing the sufficiency in law of the opponent's pleading was by "demurrer" (see DEMURRER). The Rules of the Supreme Court, 1883, abolished "demurrers," and substituted therefor other proceedings, termed "Proceedings in lieu of demurrer," by which objections in point of law to the previous pleading of an opponent *may* be taken (Order 25, rr. 1-4). Under these rules objections in point of law are no longer necessarily tried separately from issues of fact, and there is no longer of necessity an argument upon the point of law equivalent to the former argument on demurrer. Any party may by his pleading raise any point of law, and any point of law so raised shall be disposed of by the judge at or after the trial, or it may, by consent of the parties, or the order of the Court or a judge on the application of either party, be set down for hearing and disposed of at any time before the trial (Order 25, r. 2).

Points of law raised upon a pleading should be founded upon the facts appearing upon the face of the pleading of the opposite party (see Bullen and Leake's *Precedents of Pleadings*, 6th ed., p. 563), and may be pleaded to the whole, or to any distinct cause of action, ground of defence, counterclaim or reply, and they may be pleaded together with grounds of defence or of reply upon the facts (*ibid.*, p. 562).

No technical objection should be raised to any pleading on the ground of any alleged want of form (Order 19, r. 26); and it would seem that objections on the ground of mis-joinder or non-joinder of parties should not be pleaded as objections in point of law under Order 25, r. 2, but should in general be taken by summons under Order 16, r. 11 (see Bullen and Leake's *Precedents of Pleadings*, 6th ed., p. 29). So, too, defences under the Statute of Frauds, or sec. 4 of the Sale of Goods Act, 1893, or under the Statutes of Limitation, cannot be raised as objections in point of law, but must be pleaded by way of defence (*ibid.*, pp. 523, 663, 717).

For forms of pleadings of objections in point of law, see *ibid.*, pp. 561 *et seq.*, and R. S. C., 1883, App. E. s. iii.

By Order 25, r. 3, if, in the opinion of the Court or a judge, the decision of a point of law raised by a pleading substantially disposes of the whole action, or of any distinct cause of action, ground of defence,

set-off, counterclaim, or reply therein, the action may be dismissed, or such order made therein as may be just.

In addition to the powers conferred by Order 25, r. 2, it is provided by Order 25, r. 4, that the Court or a judge may order any pleading to be struck out, on the ground that it discloses no *reasonable* cause of action or answer, and may in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Proceeds.—The sum, amount, or value of goods, etc., sold or converted into money. Money paid under protest is the "proceeds" of goods and chattels taken under a *fi. fa.* within Order 57, r. 1*b*, R. S. C. (*Smith v. Critchfield*, 1885, 54 L. J. Q. B. 366). As to proceeds of sale under the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 87, see *Jones v. Parcell*, 1883, 11 Q. B. D. 430.

As to "proceeds of sale" in company matters, see *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.*, 1875, 1 Ch. D. 682, and *Brown v. Dale*, 1878, 9 Ch. D. 78.

A legacy payable out of personalty and of proceeds of the sale of real estate, is an interest in land within the Statutes of Mortmain, and cannot while it remains unpaid be bequeathed by the legatee for charitable purposes. Nor can there be any apportionment, so as to make that part of the legacy which would be paid out of personalty available for the charitable bequest (*Brook v. Badley*, 1867, L. R. 4 Eq. 106).

By a marriage settlement, lands were conveyed to trustees to the use of all the children equally, and his, her, and their heirs and assigns, with a power of sale, and a direction that the proceeds should be laid out in the purchase of other lands, or on Government or real securities, which, when purchased, should be made liable to the same trusts, estates, and limitations as were declared of the trust premises. The lands were sold and the proceeds invested on mortgage: held that the proceeds of the sale must be treated as personalty and not as realty (*Earldom v. Saunders*, Amb. 240, distinguished; *Atwell v. Atwell*, 1871, L. R. 13 Eq. 23).

The proceeds of real property sold under the Settled Estates Acts, and not yet converted into realty, have not become personal property in respect of which letters of administration can be granted (*In re Mary Lloyd*, 1884, 9 P. D. 65).

The Court will not, unless upon application being made to it, sanction the repayment of wages, etc., to bondholders out of the proceeds of the sale of a ship (*The Cornelia Henrietta*, 1866, L. R. 1 Ad. & Ec. 51).

Respecting the proceeds of the sale of stolen property, see *R. v. Justices of C. C. C.*, 1886, 18 Q. B. D. 314; and *Ker and Pearson Gee*, *Sale of Goods Act*, pp. 156 *et seq.*

Proceed to Sea.—See FINAL SAILING.

Process.—The word process, in its most comprehensive signification, includes not only the writ of summons, but all other writs which may be issued during the progress of an action, and also those writs which are used to carry the judgments of the Court into effect, and which are termed writs of execution.

"Process" is the doing of something in a proceeding in a civil or criminal Court; and that which may be done without the aid of a Court is not a "process." Therefore a distraint, whether for rent or any other payment, and whether the right of distress be by the common law or by statute, is not a "process," nor is it "an execution or other legal process," within sec. 13 of the Bankruptcy Act, 1869, or within the substituted section (s. 10) of the Bankruptcy Act, 1883 (*Ex parte Billingham and Staffs. Gas Co., In re Fanshaw*, 1871, L. R. 11 Eq. 615; *In re Peake*; *Ex parte Harrison*, 1884, 53 L. J. Ch. 977, C. A.; and *cp. R. v. Crisp*, 1818, 1 Barn. & Ald. 782). But a writ of sequestration is such a process (*In re Browne*, 1870, 40 L. J. Bank. 46).

Processum continuando.—A writ for the continuance of process after the death of the chief justice or other justices in the commission of oyer and terminer (*Reg. Orig.*, 128).

Prochien Amy.—See NEXT FRIEND.

Prochein Avoidance.—12 Anne, stat. 2, c. 12, 1714, declares void and prescribes heavy penalties for the purchase by a clergyman of the next avoidance or presentation to any benefice with cure of souls; but the purchase of an estate for life in an advowson is not such a purchase, though there be only one avoidance during the lifetime of the *cestui-que vie*—the statute applying only to chattel interests (*Walsh v. Bishop of Lincoln*, 1875, L. R. 10 C. P. 518). It was held in *Hatch v. Hatch*, 1855, 20 Beav. 105, that a devise of "the next avoidance" of a living meant the next which the testator had power to dispose of. See ADVOWSON; SIMONY.

Proclamation.

TABLE OF CONTENTS.

I. PRELIMINARY . . .	694	IV. PROCLAMATIONS MADE BY THE	
II. STATUTORY PROCLAMATIONS .	695	VICEROYS OF THE CROWN .	697
III. PREROGATIVE PROCLAMATIONS	696	V. EARLY LEGISLATION BY PRO-	
		CLAMATION . . .	698

I. PRELIMINARY.

Definition.—A Royal Proclamation is a document passed under the Great Seal whereby the Sovereign either—

- (a) Formally announces an executive Act; or
- (b) Legislates, within the limits of the legislative power of the Crown acting without Parliament (see PREROGATIVE LEGISLATION), or in pursuance of express statutory powers of legislating by proclamation (see II. below); or
- (c) Gives notice of, and enforces, laws already in force.

Like an ORDER IN COUNCIL (*q.v.*) a Proclamation is an Act of the Sovereign in Council, and the responsibility therefor rests with the Government for the time being.

To make proclamation is, says Lord Coke, a grand prerogative of the King (12 Rep. 75), and no subject can issue a public proclamation even though it concern a wholly private matter (*Sir Edward Knightly's Case*), but a mayor of a town, etc., may by custom, *ratione privilegii*, possess this right.

Wider Field formerly covered by Proclamations.—Even after the rise of Parliament, the Crown from time to time purported to legislate by proclamation in excess of the above limits. In 1539 by the Statute of Proclamations (31 Hen. VIII. c. 8) a general power of legislating by Proclamations in Council, "to be observed as though made by Act of Parliament," was delegated to the Sovereign. This power, though restricted by the provision that it was not to be prejudicial to "any person's inheritance, offices, liberties, goods, chattels, or life," threatened to transform our institutions (see DELEGATED LEGISLATION). The Act had a life of only eight years, being repealed by 1 Edw. VI. c. 12, but the practice nevertheless continued. The Petition of Grievances presented in 1610 to James the First (2 St. Tr. 525-6) makes reference to, and gives a list of, illegal Proclamations, and in the same year in the great case of *Proclamations* in 1610 (12 Rep. 74) the judges advised the Crown that the King cannot by proclamation make an offence which was not one before, for then he might alter the law of the land in a high point, but that the King, for the prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend against them, upon punishment to be inflicted by law; and that the neglect of such proclamation aggravates the offence. Illegal proclamations continued to be issued until the abolition of the Court of Star Chamber which had enforced them. A brief account of the early legislation by proclamation is given below.

Form and Publication of Proclamations.—During the Tudor and Stuart periods the forms of proclamations varied greatly, and even until thirty years ago there was no provision for uniformity in their language or mode of promulgation. By the Great Seal Act, 1877, 40 & 41 Vict. c. 41, s. 3, Her Majesty was empowered to regulate these matters by Order in Council, and Rules (St. R. & O., Rev. 1904, vol. ii., "Clerk of the Crown in Chancery," p. 14) accordingly provide for the sending to sheriffs of copies of all Royal Proclamations (except those further proroguing Parliament), but no forms of proclamations have been prescribed. The Rules of February 22, 1878 (*ibid.*, p. 14), under the same Act (s. 5), provide that all Royal Proclamations shall have the Wafer Great Seal (see GREAT SEAL) attached to them. All proclamations are gazetted, and are valid in law if so published (40 & 41 Vict. c. 41, s. 3 (3)).

Classes of Proclamations.—Viewed from the question of enabling authority (see article DELEGATED LEGISLATION), a proclamation like an ORDER IN COUNCIL (*q.v.*) falls into one of the two main classes, those issued under the Royal Prerogative, and those issued under express statutory powers. In common with other forms of subsidiary legislation, the two classes are dealt with in the articles PREROGATIVE LEGISLATION, and STATUTORY RULES AND ORDERS respectively, where the question of the validity of both classes of orders is discussed.

It will be sufficient here to give an indication of the field covered by proclamations of either character.

II. STATUTORY PROCLAMATIONS.

Currency.—The Statutory Proclamations made directly by the Sovereign are few in number, and amongst the most important are those under the Coinage Acts, 1870 and 1891, 33 & 34 Vict. c. 10; 54 & 55 Vict. c. 72, which regulate the denominations, designs, and

currency of coins, and the extension of the Acts to British Possessions. As to these, see the articles COIN, BRITISH, and COIN, BRITISH POSSESSIONS. Colonial currency, apart from these proclamations, is in the main regulated by PREROGATIVE LEGISLATION. See that article.

Royal Arms and Style—Navy and Army.—The Royal Arms and Flags, and the Style and Titles of His Majesty, are prescribed by Statutory Proclamations (St. R. & O., Rev. 1904, vol. i., "Arms, Ensigns, etc."), and such proclamations summon the Scottish peers to elect representatives to the House of Lords. The calling out of the Naval or Army Reserves is effected by Statutory Proclamation, and the embodiment of the new Territorial Force is made dependent on such proclamations. The freight for specie, jewels, etc., carried on His Majesty's ships is also regulated by Statutory Proclamation (St. R. & O., Rev. 1904, vol. ix., "Navy," p. 78), as are the shares in which prize money, bounty, and salvage is to be distributed between officers and men (*ibid.*, p. 109).

Federal Unions.—The machinery of Statutory Proclamation was also used in the establishment of the two great federations of the DOMINION OF CANADA and the COMMONWEALTH OF AUSTRALIA (*q.v.*), but the constitution of most of the colonies is based on PREROGATIVE LEGISLATION, and is dealt with in that article.

Under the Acts of 1833 (repealed in 1890) as to royal and parliamentary burghs in Scotland the division of burghs into wards was effected by Statutory Proclamation (3 & 4 Will. IV. c. 76, s. 7; 3 & 4 Will. IV. c. 77, s. 3).

III. PREROGATIVE PROCLAMATIONS.

Field Covered.—The King may by Prerogative Proclamation call or dissolve Parliament, declare war or peace, promulgate blockades, authorise the Admiralty to grant letters of marque, appoint fasts, enjoin the reading of a form of prayer, and enforce laws already in force. Proclamations are also issued on certain high occasions of State (see PREROGATIVE LEGISLATION), and the royal prerogative of pardon has been on certain occasions exercised by proclamation.

Dominions and Protectorates.—The annexation to the British Crown of new territories is effected by Prerogative Proclamation, and in some cases (*e.g.* CEYLON (*q.v.*)), the laws in force in the conquered provinces are specifically continued, and the practice of barbarous modes of punishment abolished by the like means. It was by Prerogative Proclamation of September 2, 1858 (Hertslet's *State Papers*, vol. lix., p. 505), that the Government of India was assumed by the Crown, and it is by such a proclamation that a British protectorate (see PROTECTORATE) is declared over territories not formally annexed.

Declaratory Proclamations.—On the outbreak of war between Powers with whom Great Britain is at peace, a proclamation is issued (*e.g.* St. R. & O., 1904, p. 152, Russo-Japanese case) enforcing the provisions of the Foreign Enlistment Act, 33 & 34 Vict. c. 90. Other instances of nineteenth century proclamations declaratory of the law are the Proclamation of 1831 as to the Bristol Riots (*London Gazette*, November 2, 1831, p. 2273), that of 1843 as to the Rebecca Riots (*London Gazette*, October 3, 1843, p. 3213), and that (November 22, 1831, p. 2421) declaring "Political Unions" to be illegal. A meeting which is proclaimed is, apart from express statutory provision (as to Ireland, see under IV. A below), not thereby rendered illegal; the pro-

clamation is only a notice that in the opinion of the Government the meeting is likely, or certain, to assume an illegal character. A proclamation was issued in 1834 (*London Gazette*, June 5, 1834, p. 1039) for the apprehension of witnesses refusing to appear before Parliament, and in 1851 (*London Gazette*, May 6, 1851, p. 1195), for the apprehension of certain persons guilty of breach of privilege. The Proclamation of 1852 against Roman Catholic processions was in enforcement of sec. 26 of the Roman Catholic Relief Act, 1829, which section is still in force. The Proclamation "against Vice and Immorality," formerly read at the opening of assizes and Quarter Sessions, was discontinued by Order in Council in 1884 (St. R. & O., Rev. 1904, vol. xii., "Supreme Court, England," p. 37).

IV. PROCLAMATIONS MADE BY THE VICEROYS OF THE CROWN.

A. *Proclamations of the Lord-Lieutenant of Ireland.*—The machinery of statutory proclamation is employed far more extensively in Ireland than in Great Britain. It takes the form of a Proclamation in Council. On such proclamations the boundaries of all the Irish counties (see St. R. & O., Rev. 1904, vol. ii., "County, Ireland"), and the districts and Courts of Irish County Court judges, and chairmen of Quarter Sessions (*ibid.*, vol. iii., "County Court, Ireland") depend. (For the most recent orders, see volumes of St. R. & O., 1904-1907.)

The Criminal Law and Procedure (Ireland) Act, 1887, 50 & 51 Vict. c. 20, is also put in force by Proclamation in Council. There are now no "proclaimed districts" under sec. 5 of the Act (see St. R. & O., 1891, p. 607; St. R. & O., 1892, pp. 766, 767), nor are there in force any "special proclamations" under sec. 6, declaring associations dangerous and liable to suppression. All such proclamations, except that as to the Irish International League, were withdrawn in 1891 (St. R. & O., 1891, p. 607), and that as to the League in 1892 (St. R. & O., 1892, p. 170).

The Peace Preservation (Ireland) Act, 1881, 44 & 45 Vict. c. 5, under which the possession of arms in "proclaimed districts" thereunder was prohibited, was allowed to expire on December 31, 1906. As representing the Crown, the Lord-Lieutenant can, apart from statutory powers, issue proclamations declaratory of the existing law.

B. *Proclamations of Colonial or Protectorate Governors.*—Under colonial legislation certain powers of legislation by proclamation are delegated to the Governor of the colony. In Canada "Proclamations under the Great Seal of Canada" (Revised Statutes of Canada, c. 1, s. 34 (8), (21)), often determine when Acts come into operation. Imperial Acts relating to a colony sometimes (*e.g.* 34 & 35 Vict. c. 107, s. 4) provide that they shall operate as from a day to be declared by colonial proclamation. Further, Letters Patent providing for the government of, or otherwise affecting a British possession, contain a clause providing for their being brought into force by a proclamation of the colonial Governor. Such Letters Patent have no effect until so proclaimed, and where they appoint to an office are null and void unless so proclaimed within certain statutory periods (26 & 27 Vict. c. 76). The Orders in Council regulating currency in certain British possessions and protectorates (St. R. & O., Rev. 1904, vol. ii., "Coin, Colonies") provide for their being brought into force by similar local proclamation. As representing the Crown, a governor, or administrator, can issue proclamations declaratory of the existing law.

In Gibraltar, and in the Protectorates of Northern Nigeria, and

the Sudan, the local legislation takes the form of proclamations of the Governor of the possession or protectorate. In the possession of Basutoland, and in the protectorates of Bechuanaland, North-Western Rhodesia (Barotziland), and Swaziland, legislation is by proclamation of the High Commissioner for South Africa.

V. EARLY LEGISLATION BY PROCLAMATION.

Groundwork of Statute Law.—Though many of the proclamations of the seventeenth and earlier centuries were within the constitutional limits as being directed only to enforcing laws already in force (see above), others purported to establish new laws, and in many cases formed the groundwork of subsequent Acts of Parliament. To such proclamations may be traced the origin and monopoly of the Post Office, the prohibition on growing tobacco in the United Kingdom, the reformation of the calendar, and the Pharmacopœia.

Post Office.—A Postmaster-General was appointed at least as early as 1533 (see POST OFFICE). During the 130 years which elapsed before parliamentary legislation established a post office, the service was regulated by proclamations, of which the first (1555) was restricted to letters to Dover, that of May 15, 1609, gave the Post Office a monopoly in letter-carrying, whilst that of July 31, 1635, established eight main postal lines. The foreign and colonial post system also derived its origin from letters patent in 1619, creating a separate Postmaster-General of England for foreign parts, and a proclamation of February 1638, confirming an agreement between the English and French postmasters as to Anglo-French postage. In 1646 the judges decided that a monopoly of letter-carrying could only be conferred by Act of Parliament, and Parliament conferred it by a Commonwealth Ordinance (1657, c. 30), which, like much of the Commonwealth legislation, found a place in Charles II.'s Statute-Book (12 Car. II. c. 35). The power of a Secretary of State to open letters also originates in a proclamation—that of May 25, 1663.

Tobacco Planting.—On December 30, 1619, James issued a proclamation forbidding the planting of tobacco in England and Wales, as being more unwholesome than that imported, and as causing the use of it to spread into the country parts of the kingdom. Further proclamations followed in 1624, 1627, 1631, and 1634, extending the restriction to Ireland, but the prohibition was not embodied in an Act of Parliament until the passing, in 1660, of 12 Car. II. c. 34—repealed in 1907 (7 Edw. VII. c. 3), so far as regards Ireland.

Reformed Calendar.—The Brief of March 1, 1582, of Pope Gregory XIII. establishing the calendar which bears his name was followed in April 1583 by a proclamation of Elizabeth reforming the calendar, and two years later a bill to the same purport was introduced into Parliament. But Protestant feeling against all emanating from a papal source was too strong for this to pass the Commons, and it was not till nearly 200 years later that the Calendar (New Style) Act, 1750, 24 Geo. II. c. 23, was passed.

Pharmacopœia.—The grant of a separate charter in 1617 to the Apothecaries Company, was followed the next year by a proclamation (April 26, 1618) establishing the first Pharmacopœia Londiniensis, "lately compiled by the College of Physicians in London," in which earthworms and moss growing on human skulls figured as ingredients.

Subsequent editions followed, but it was not till that of Sir Hans Sloane (1721) that the more ridiculous remedies were omitted; since the first Medical Act, 1858, the Pharmacopœia has been issued under statutory authority.

Protection of Birds.—The origin of our Wild Birds Protection Acts may also be traced in the Tudor and Stuart proclamations which at first directed to the preservation of pheasants, partridges, and herons, included later the mallard and other birds.

Duelling.—"Challenging and fighting, man to man, under the name of Duellum, which is used now a dayes among soldiers and men of honour" was unknown in England until the sixteenth century, and had only recently become common when Bryskett, in 1606, published his *Civil Life*. It was evolved from the legal form of trial by battle, and hence English law long refused to recognise duelling as an offence—though in strict law it was murder. It has never been the subject of express parliamentary legislation, but various proclamations (*eg.* that of August 13, 1660) were issued forbidding it. The Indian Penal Code makes it manslaughter.

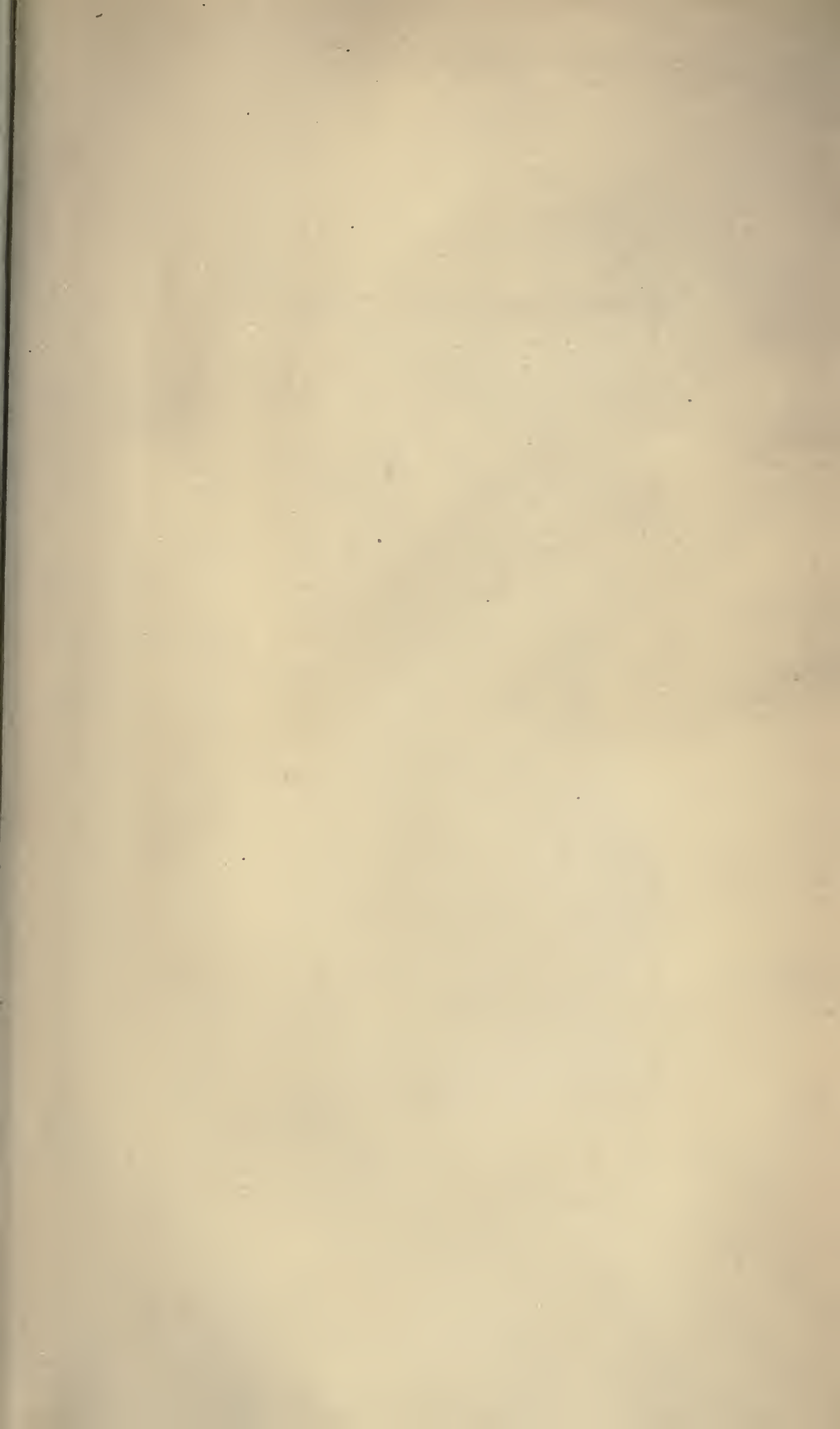
Enforcement of Laws.—Many of the proclamations for the enforcement (as opposed to the enactment) of laws, were directed to the putting in force of the statutes of apparel, of Edward IV.'s "fair trade" legislation (3 Edw. IV. c. 4) for the protection of the woollen, painted ware, playing-card, pin-makers, and other industries, of the Tudor legislation against building in London and Westminster, and of the statutes for licensing pedlars (which originated with 5 & 6 Edw. VI. c. 21), of the laws against vagrants, smuggling, and riots, and as to customs and excise, and as to bounties to seamen, and for prohibiting seamen "from serving foreign princes and States." Very numerous were the proclamations against pirates, as to quarantine, as to the export of wool and corn, for enforcing uniformity in WEIGHTS AND MEASURES (*q.v.*), and against base money or defacing the coinage—those as to new coinage are referred to above. With the Reformation came proclamations against Jesuits and seminary priests, which form a contrast to what is one of the earliest proclamations extant, that of April 11, 1207, which directs that "if anyone injure religious persons he shall be hung on the nearest oak."

Considerations of space forbid notice of much that is curious, but the proclamations of 1560 against foreign Anabaptists, of July 20, 1618, against excessive traffic "to the destruction of high-ways," of April 25, 1623, as to registering the names of knights at Heralds' College, those as to brick-making, those directed against the gentry leaving their country houses for London, and that of December 3, 1808, requiring all masters of families to reduce the consumption of bread in their families, may be mentioned.

[*Authorities.*—Broom, *Constitutional Law*; Chitty, *Prerogative*; and (as to early proclamations) Rymer, *Fœdera*; *State Papers Domestic*; *The Book of Proclamations*, printed by order of James I.; Ruding, *Annals of the Coinage of Great Britain*, 3 vols., 1840 ed.]

Proclamation of War.—See WAR.

Pro-Consul.—See CONSUL.



311126

Law.D
E565.2

Author

Title Encyclopaedia of the laws of England. Ed. 2.
vol. 11.

**University of Toronto
Library**

**DO NOT
REMOVE
THE
CARD
FROM
THIS
POCKET**

Acme Library Card Pocket
LOWE-MARTIN CO. LIMITED

